Office - Supreme Court, U. S.
FILED
NOV 18 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 580

MILTON K. YOUNG AND MELISSA E. YOUNG,
Petitioners,

vs.

COUNTY OF VENTURA, A BODY POLITIC INCORPORATE AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO, AND BRIEF IN SUPPORT THEREOF.

ROBERT M. CLARKE,
MILTON K. YOUNG,
CHARLES C. MONTGOMERY,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinion below	2
Jurisdictional statement	4
Statement of the case	6
Questions presented	9
Reasons relied on for the allowance of the writ	10
Conclusion	11
Brief in support of petition	13
Assignment of errors relied upon	14
The statute drawn in question	17
Argument	18
The division of a county of flood waters on to plaintiffs' lands to their serious damage constituted a taking in violation of Section One of the Fourteenth Amendment to the United States Constitution	18
Act 5149 construed by the District Court of Appeals to bar petitioners' action to recover compensation for the damaging and taking of their private property for public use is confiscatory and deprives petitioners of their property without due process of law, as prohibited by Section 1 of the Fourteenth Amendment to the Constitution of the United States	19
It constituted further violation of the due process and equal protection of the law provisions of the United States Constitutional Amendment to reject plaintiffs' claim and adjudge against it on the basis that it was not filed within the time provided by Act 5149, Deering's General Laws of California (Stat. 1931), p. 2475. The Act, if applicable, is itself unconstitutional as an unreasonable restriction of petitioners' constitutional rights	23

Act 5149 Does Not Confer the Right to Recover Compensation for Property Taken for Public Use and Cannot Restrict Such Right 26
Act 5149 Was Not Designed to Apply to Cases of Taking for Public Use Without Compensation, and was Therefore Improperly Applied in Violation of Petitioners' Constitutional Rights 27
Act 5149 is Void as Against Public Policy as Permitting Control of a County Board's Powers to Be Exercised by a Third Person 29
Act 5149 and the Decision Below Deprive Petitioners of the Equal Protection of the Laws if Applied to Flood Control Districts in Some Counties and Not in Others 29

Page

Conclusion 11, 31
Appendix—Act 5149 32
Section 4075 of the Political Code of California 33

TABLE OF CASES CITED.

Board of Commissioners of Jackson County v. *United States*, 100 F. (2d) 929 ..... 11, 23
Briscoe v. *Metropolitan St. Ry. Co.*, 120 S. W. 1162 28
Coniff v. *San Francisco*, 67 Cal. 49 27
Crawford v. *Duncan*, 1 Cal. App. 647 23
Dufell v. *State Superior Court, New York Appellate Division*, 189 N. Y. Supp. 7593 23
Durham v. *City of Spokane*, 68 Pac. 386 23
Elliott v. *Los Angeles County*, 183 Cal. 473 27
Hartford A. & I. Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178 ..... 11, 25
Home Insurance Co. v. *Dick*, 281 U. S. 397, 74 L. Ed. 926 ..... 11, 25
Hopkins v. *Clemson Agricultural College*, 221 U. S. 636, 31 S. Ct. 654, 55 L. Ed. 890 ..... 11, 19
Lamb v. *Powder River Live Stock Co.*, 132 Fed. 434 20
Middlekamp v. *Bessemer Irrigation Ditch Co.*, 46 Cal. 102, 103 Pac. 280 23
Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393, 67 L. Ed. 322 ..... 11, 27
Perkins v. *Blauth*, 163 Cal. 787, 127 Pac. 52 ..... 19, 27
Pumpelly v. *Green Bay*, 13 Wall. 166, 20 L. Ed. 557 ..... 11, 18
Reed v. *State*, 108 N. Y. 407, 15 N. W. 735 23
Saunders v. *City of Boston*, 167 Mass. 595, 46 N. E. 98 23
Schmidt v. *Indiana Travelers Accident Assn.*, 85 N. E. 1032 28
United States v. *Cress*, 243 U. S. 316, 61 L. Ed. 746 ..... 11, 19
United States v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539 ..... 11, 27
Ward v. *Love County*, 253 U. S. 17, 40 S. Ct. 419, 64 L. Ed. 751 24
Yonker v. *City of San Gabriel*, 23 Cal. App. (2d) 556 8
Young v. *Ventura County*, 102 Cal. App. Dec. 127 13

Statutes Cited.

	Page
Act 5149, Deering's General Laws (Stats. of California), 1931, p. 2475	11
Act 5619, Deering's General Laws (Stats. 1923), p. 675, Section 2	26
California State Constitution, Article VI, Section 4-c	2
Article I, Section 13	3
Article I, Section 14	26
Constitution of the United States, 14th Amendment,	2, 3, 6, 10, 14, 16
Code of Civil Procedure of California, Secs. 335-338	22
Judicial Code, Sec. 237(b), 28 U. S. C. 344(b)	4, 13
Political Code of California, Sec. 4003	29
Sec. 4075	9, 10, 22, 30
Sec. 4076	10

Text Books Cited.

1 C. J., Sec. (5) E, p. 392	28
12 C. J., Sec. 114 (6), p. 732	26

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 580

MILTON K. YOUNG AND MELISSA E. YOUNG,
Petitioners,

vs.

COUNTY OF VENTURA, A BODY POLITIC INCORPORATE AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Milton K. Young and Melissa E. Young, respectfully pray that a writ of certiorari issue to the District Court of Appeal of the State of California, Second Appellate District, Division Two, to review the judgment of said District Court of Appeal affirming the decree of the Superior Court of the State of California in and for the County of Ventura, in that certain action between the above-

named parties which is disclosed by the certified record accompanying this petition.

Opinion Below.

The opinion rendered by the District Court of Appeal is reported in 102 Cal. App. Dec. 127 (R. 32).

The decision of the District Court of Appeal was pronounced July 1, 1940, and became final July 31, 1940, and subject to review under Article VI, Section 4-c of the California State Constitution.

A petition was duly filed in the State Supreme Court for a hearing of the case after the said decision of the District Court of Appeal had become final. The petition for hearing was denied by the State Supreme Court August 29, 1940, making the decision final for the purpose of review by your Honorable Court.

Petitioners greatly regret the necessity of bringing to the attention of this Honorable Court the fact that the opinion of the District Court of Appeal does not at any point therein indicate that petitioners in their opening brief, or otherwise, argued or asserted their reliance upon, and claim to, the protection of the due process and equality clauses of the Fourteenth Amendment to the Constitution of the United States.

Conceiving that this Court may be led by the silence of the opinion in the respect mentioned, to the conclusion that petitioners have not presented the Federal constitutional questions in their briefs, petitioners deem it their duty to present to this Court a few of many quotations that could be made, from petitioners' opening and the respondent's reply briefs, and also from the petitioners' oral argument in the District Court of Appeal and in their petition to the Supreme Court of California, to hear the cause after the decision of the District Court of Appeal—to the end

that it may be affirmatively shown that petitioners have not been derelict in their duty as to the presentation of the Federal questions.

Appellants' opening brief in the District Court of Appeal says, at p. 13:

> * * * "In the manner indicated by the above heading, the respondent County of Ventura runs counter to the 14th Amendment to the Constitution; first, it inundates appellants' property by the diversion of storm waters, which amounts to the taking thereof without due process of law, and second, when appellants seek by action to recover damages for the prohibited taking of their property, it pleads a state statute (Act 5149, Stats. 1931, p. 2475) which, as construed by the court on demurrer, forbids the prosecution of the action pursuant to a constitutional guaranty because appellants did not file their claim within ninety days 'after the accident has occurred'—can the due process clause of the 14th Amendment be thus thwarted by a state statute, particularly by this statute? *That is the question—that is the issue in this case.*"

Respondent's reply brief in the District Court of Appeal, at p. 34, says:

> "We submit that unless Act 5149 does indeed violate due process as prohibited by section 13, article I of the Constitution of California, *or section 1 of the Fourteenth Amendment to the Federal Constitution*, the demurrer to the complaint here under scrutiny by the Court must be sustained."

Petitioners, at the oral argument in the District Court of Appeal, said:

> "Mr. Young: The cornerstone of plaintiffs' case is the Fourteenth Amendment to the Constitution. You will bear in mind that this case arises by reason of the unlawful diversion of the waters of Nigger Canyon, by which acts the storm waters were diverted toward

> the plaintiffs' land, the natural course of the stream having been in another direction. * * *"

And in their petition for hearing of said cause before the Supreme Court of California, petitioners said, in their first assignment of error, at page 2:

> "(1) Said decision is in error in its failure to notice and decide the validity or invalidity of Act 5149, Deering's General Laws (Stats. 1931), p. 2475, under the due process clause of the Fourteenth Amendment to the Constitution of the United States. * * *")

Jurisdictional Statement.

Jurisdiction of this Court is invoked under Sec. 237 (b) of the Judicial Code, 28 U. S. C., Sec. 344 (b), allowing certiorari to a State court of last resort.

This Court has jurisdiction of this case by reason of the decision rendered herein by the District Court of Appeal of the State of California, Second Appellate District, Division Two, on the 1st day of July, 1940, wherein the application of a State statute, Act 5149, Deering's General Laws (Stats. of California), 1931, p. 2475, set forth in full in the appendix hereof, p. 32, has deprived petitioners of their property and property rights in violation of the due process and equality provisions of the Fourteenth Amendment to the Constitution of the United States.

Said statute so applied is repugnant to the Constitution of the United States. The statute is not applicable to petitioners' case. Applying it thereto in itself is a violation of the constitutional provisions.

The action was brought for the recovery of compensation for the damaging and taking of petitioners' property for public use without compensation, by reason of the act of the defendant County, respondent, in diverting storm waters so they overflowed petitioners' land. The question is sub-

stantial as it involves the question whether the due process and equality clauses of the Fourteenth Amendment may be nullified by the State statute, it is repugnant to the Constitution, and petitioners have, by the decision, been deprived of their property without compensation without due process of law and have been denied equality before the law.

The legal issue arose upon the pleadings, the petitioners, as plaintiffs, having pleaded in their complaint that their property had been damaged and taken for public use without compensation, and that they had been denied due process and equality, as guaranteed by the Fourteenth Amendment to the Constitution (R. 8).

The defendant County, respondent, filed a special and general demurrer, under which it was contended that the claim of plaintiffs was not filed within the time limited by Act 5149, Deering's General Laws (Stat. 1931), p. 2475; that action was barred by said statute, and that there was no pleading that the injury occurred within ninety days prior to the time of the filing of the plaintiffs' claim.

The Superior Court sustained the demurrer without leave to amend (R. 30). An appeal was taken to the Supreme Court of the State of California from said judgment on December 30, 1939 (R. 31). The Supreme Court transferred the case to the District Court of Appeal, Second Appellate District, which affirmed the judgment of the Superior Court.

The constitutional questions pleaded in the complaint, as above mentioned and referred to in defendant's demurrer and points and authorities, were argued by the respective parties in their briefs in the District Court of Appeal, and petitioners, in their oral argument before that court, restricted their argument to the Federal constitutional questions.

In their petition to the Supreme Court for a hearing of the cause after the decision in the District Court of Appeal, petitioners argued said constitutional questions, and the defendant County, respondent, in their answer to the said petition, argued the said questions.

The decision of the District Court of Appeal in this case is the only decision ever rendered in the State of California in which there has been presented the question of the repugnance of Act 5149 to the Fourteenth Amendment to the Constitution. No statute of limitations for such limited period, concerning damages to real property, has ever before been enacted in this State, or any other State, so far as petitioners' very extensive examination discloses.

Section 1 of Act 5149 provides:

> "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received."
>
> (Statute in full set out in appendix, p. 32.)

Petitioners deem it proper at this point to note the omission from the above section of the statute of designation of flood control districts, concerning which denial of equality between property owners in such flood control districts and property owners in the specified localities will be more fully presented, in the supporting brief herewith.

Statement of the Case.

Plaintiffs, petitioners herein, sued in the Superior Court of the County of Ventura, State of California, for compen-

sation under the due process clause of the Fourteenth Amendment for the damaging of their agricultural property for public use by reason of the said county's wrongful diversion of storm waters from their natural course, which caused the inundation of their said lands and the impairment, injury and destruction of many of the trees of the orange grove thereon.

Two causes of action are stated in the complaint. The first sets out the facts in the form of a common law action (R. 1-9); the second count repeats by reference the facts alleged in the first cause of action and in Paragraph III of said second cause of action claims the benefit and protection of the Fourteenth Amendment as the same relates to the denial of due process of law (R. 8), and in Paragraph IV alleges in substance that the damaging of plaintiffs' property constituted the taking thereof without due process of law, as prohibited by Section 1 of the Fourteenth Amendment to the Constitution of the United States and also constituted denial to plaintiffs of equal protection of the laws of the United States prohibited by said Section 1 of said Fourteenth Amendment (R. 8).

The complaint alleges the impossibility of ascertaining the extent of the injuries and the amount of damages to petitioners' orchard prior to the date of the filing of the claim with the Board of Supervisors of the County of Ventura, December 28th, 1938, and further alleges the rejection of said claim by said Board on about January 17, 1939 (R. 6-7-8). Said claim is shown in Exhibit "A" of the complaint, in which it is set forth that the materials and manual labor work required for the restoration of the inundated premises began on March 7, 1938, and ended October 29, 1938 (R. 15-26) and that the last contract work for bulkheading of embankment ended October 24, 1938 (R. 17-18).

The complaint was filed in the Superior Court of the County of Ventura, State of California, on the 27th day of February, 1939.

The defendant county filed a demurrer to said complaint, special and general, particularly on the ground that it "does not state facts sufficient to constitute a cause of action" (R. 27) and filed points and authorities as to the basis of their demurrer (R. 29).

The contention made by the defendant was that the claim of said plaintiffs was not filed within the time limited by Act 5149, Deering's General Laws (Stats. 1931), p. 2475 (*Yonker* v. *City of San Gabriel*, 23 Cal. App. (2d) 556), and that the action was barred by said statute and that there was no pleading that the injury occurred within ninety (90) days prior to the time of filing the plaintiffs' claim.

Also defendant's points and authorities on demurrer allege that Act 5149, and other similar statutes, do not violate the Fourteenth Amendment (R. 30).

The Superior Court sustained the demurrer without leave to amend on the 20th day of November, 1939 (R. 30), and judgment "that plaintiffs take nothing by their action" was entered December 7, 1939 (R. 30). Notice of appeal to the Supreme Court of the State of California from said judgment and from the whole thereof was dated, served and filed December 20, 1939 (R. 31).

The case was transferred for hearing by the Supreme Court to the District Court of Appeal, Second Appellate District, State of California, which in due course rendered its opinion affirming the judgment of the Superior Court. Petition for hearing of said case after the decision of the District Court of Appeal by the Supreme Court, was denied by that court August 29, 1940 (R. 38).

Questions Presented.

(1) Whether Act 5149, Deering's General Laws (Stats. 1931), p. 2475, applies to, or, in any manner comprehends, a cause of action for the recovery of compensation for the damaging and taking of real property (R. 35);

(2) Whether Act 5149 as construed by the District Court of Appeal is repugnant to the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States (R. 33-34);

(3) Whether Act 5149 as construed by the District Court of Appeal, has deprived petitioners of their property without due process of law;

(4) Whether the provision of Section 1 of Act 5149, to the effect that claims for damages must be filed within ninety days after the "accident", is unreasonable and unconstitutional. In this case injuries to the trees of the orange orchard did not develop for a period of more than nine months (R. 6) and the period of time required for the restoration of the land and the orange grove thereon and the ascertainment of the cost thereof, required a period of seven months twenty-seven days (R. 26);

(5) Whether the District Court of Appeal should not have construed said Section 1 of Act 5149 in connection with Section 4075, Political Code (appendix, p. 33), a general law on the subject of claims against counties wherein it is provided that all claims must be itemized and that claims, including a damage claim, may be filed within one year after the last item set forth therein;

(6) Whether the statute by reason of not including flood control districts exempts such districts from the requirement that claims for damages be filed within ninety days and whether the statute thereby exempts the owners of

property within flood control districts and denies equality to the owners of property in the municipalities, counties, etc., named in the statute;

(7) Whether the provision of Section 2 of said Act, to the effect that special counsel may be employed to have charge of a suit against a municipality, county, city and county, or school district, as the case may be, and the provision of Section 4 thereof to the effect that such special counsel, when employed, shall approve the terms of any compromise by city, county or school district, etc., deprives a board of supervisors of a county of power to compromise a claim and delegates such power in the specially employed attorney, thus preventing the claimant from having an independent decision by the board on the compromise of his claims, as provided by Political Code Section 4075-4076, resulting in the denial of due process.

Reasons Relied on for Allowance of Writ.

(1) The State Court has decided a Federal question of substance not heretofore determined by this Court, to-wit, whether or not Section 1 of the Fourteenth Amendment to the United States Constitution may be invoked when the same has been violated by a county in the diversion for public use of flood waters onto plaintiffs' land, to their serious damage and the damage, impairment and partial destruction of their said land, when the claim for said damages was not filed within the time prescribed by a special statute, Act 5149 Deering's General Laws (Stats. 1931) p. 2475, notwithstanding the claim was presented to the proper body within the time prescribed by general laws, to-wit, Section 4075 of the Political Code of the State of California, and notwithstanding no such statute of limitations may unreasonably, if at all, restrict plaintiffs' constitutional rights. (Appendix, p. 33.)

(2) The State Court has decided such questions in a way not in accord with applicable decisions of this Court, to wit:

Wrongful Diversion of Flood Waters onto privately owned Lands Without Compensation is not Due Process of Law and Denies Equal Protection of Law:

Pumpelly v. *Green Bay, etc.*, 13 Wall. 166, 20 L. Ed. 557;
United States v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539;
Hopkins v. *Clemson Agricultural College*, 221 U. S. 636, 31 S. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243;
United States v. *Cress*, 243 U. S. 316, 61 L. Ed. 746;
Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393-422, 67 L. Ed. 322.

Improperly Applying a Non-applicable Statute of Limitations is not Due Process of Law:

Board of Commissioners Jackson Co. v. *U. S.*, 100 F. (2d) 929, modified on certiorari in another respect, 84 L. Ed. Adv. Op. (No. 4), p. 233;
Home Insurance Co. v. *Dick*, 281 U. S. 397, 407, 74 L. Ed. 926, 923;
Hartford A. & I. Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178.

The State statute improperly applied as to filing claim within ninety days after the "accident" is Act 5149 Deering's General Laws (Stats. 1931) p. 2475. No "accident" is involved here.

The applicable section of the code, with which plaintiffs claim fully complies, is section 4075 of the Political Code, set out in the appendix.

Conclusion.

The question is an important one because there is probably not another State in the Union where so much litigation has arisen as in California, by reason of the diversion

of storm and river waters from their natural courses. The question is important in the mining districts and rice plantations in the northern part of the State, in the orange growing districts of central and southern California, and in the alfalfa regions of the entire State. The question is important to the public officials of each county of the State. The question is important to the owners of agricultural lands in reference to their right to receive just compensation when their property has been damaged and taken for public use, and also the question is important as between the owners of land in counties without flood control districts and the owners of land in counties where such districts exist.

In as much as the State Supreme Court has declined to pass upon the questions presented in this case, in the denial of a petition for the hearing thereof, it is extremely important that a decision be rendered by this Honorable Court in reference to the repugnance of the statute in question to the Constitution of the United States, and particularly the due process and equality provisions of the Fourteenth Amendment thereof.

For these reasons, it is respectfully submitted that this petition should be granted.

ROBERT M. CLARKE,
MILTON K. YOUNG,
CHARLES C. MONTGOMERY,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 580

MILTON K. YOUNG AND MELISSA E. YOUNG,
Petitioners,

vs.

COUNTY OF VENTURA, A BODY POLITIC INCORPORATE AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The foregoing petition is for certiorari under 237 (b) of the Judicial Code, 28 U. S. C. 344 (b) to reverse a State court decision, *Young* v. *Ventura County*, 102 Cal. App. Dec. 127.

A concise statement of the case with the questions presented, jurisdiction, and reasons relied upon for allowance of the writ is set out in the petition.

Petitioners, in the statement of the case herein have, as above stated, shown facts in the complaint. Petitioners emphasize here that they pleaded in the second cause of action in the complaint, their claim to the benefit and protection of the due process and equality clauses of the Fourteenth Amendment to the Constitution of the United States,

and also pleaded that the defendant county had damaged and taken their private property for public use without just compensation; that it deprived them of their property without due process of law, and that they had been denied the equal protection of the laws (R. 8).

The defendant county filed a demurrer, general and special, upon the ground that the claim of petitioners was not filed within the time limited by Act 5149, Deering's General Laws (Stats. 1931, p. 2475), (Appendix), and that the action was barred by said statute and that there was no pleading that the injury occurred within ninety days prior to the time of filing the plaintiffs' claim (R. 27).

Defendant also filed points and authorities as to the basis of their demurrer (R. 29) in which they set forth that Act 5149 was not in violation of the Fourteenth Amendment to the Constitution of the United States (R. 30), thus the legal issue was made by the respective parties to the action upon which the defendant's demurrer to the complaint was sustained without leave to amend, and a judgment entered accordingly (R. 30). The case comes before this Court after the affirmants of the judgment of the Superior Court of the District Court of Appeal (R. 32-37), the highest court, the Supreme Court of the State having denied petitioners' application for a hearing in said court.

The issue is clearly made, the petitioners claiming that their property has been taken from them without due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment, petitioners claiming that the statute is in violation of the Fourteenth Amendment in the respects mentioned, and therefore repugnant to the Constitution of the United States, and the defendant claiming that the said statute does not violate the mentioned guarantees of the Fourteenth Amendment.

The opinion of the District Court of Appeals does not disclose the fact that petitioners in their complaint pleaded

(R. 8) and throughout the proceedings raised the question of denial of due process and equality as guaranteed by the Fourteenth Amendment. The discussion of constitutional question in the opinion is restricted to Section 14 of Article I of the California Constitution, which provides that private property shall not be taken or damaged for public use without just compensation, and while the term "due process" is mentioned in the opinion, the reference implies that it is directed to the term "due process" as it is set forth in Section 13 of Article I of the State Constitution (R. 36).

The decision of the District Court of Appeal in this case is the only decision ever rendered in the State of California in which there has been presented the question of the repugnance of Act 5149 to the Fourteenth Amendment to the Constitution. No statute of limitations for such limited period, concerning damages to real property, has ever before been enacted in this State, or any other State, so far as petitioners' very extensive examination discloses.

Assignment of Errors Relied Upon.

(1) The District Court of Appeal errs in not making specific mention in its decision of the Federal constitutional questions raised by the pleadings and in construing the California State Constitution only in arriving at its decision.

(2) That said Act 5149 and said decision are in derogation of the rights of the plaintiffs as guaranteed by the Constitution of the United States, and especially as guaranteed by the Fourteenth Amendment thereof. That by said decision plaintiffs are deprived of their property without due process of law and are deprived of equal protection of the law.

(3) Said decision is in error in holding that said Act 5149 confers the right of action where private property is taken for public use without compensation.

(4) Said Act 5149 as construed by said decision in reference to its ninety-day provision, is an unreasonable statute of limitations confiscatory of private property, and null and void under the prohibitions of the Fourteenth Amendment to the Constitution of the United States.

(5) Said decision is in error in holding that a claim for damages must be filed within ninety days after it has occurred in a case where the time actually required for the restoration of an inundated and rock covered orchard extends over a period longer than ninety days (in the instant case a period of seven months and twenty-seven days) and also when the damages to the trees of an orchard, as in the instant case, do not develop and cannot be ascertained until long after the said ninety-day period—a period of nine months and twenty-six days.

(6) The decision is in error in not holding that the time for the filing of a claim under the ninety-day provision of the statute begins to run from the date that the damages are ascertainable instead of from the date of the injuries.

(7) Said decision is in error in holding that said Act 5149 applies to or comprehends injuries to privately owned real property occurring by the wrongful acts alleged in the complaint, and it is also in error in holding that the statute applies to any injuries other than those accidental in their nature to persons or to personal property by reason of the "dangerous or defective condition" of highways, bridges and other public places mentioned in the statute, and which occur on or in said public place.

(8) The court erred in holding that the word "accident" used in the statute should be construed as including the word "injury," thereby enlarging the purpose of the legislature to deal with accidents so as to include intentional acts, torts and known wrongs such as the diversion of a stream from its natural course.

(9) The District Court of Appeal erred in sustaining the validity of Act 5149, in that said Act by reason of not including flood control districts, exempts owners of property within such districts from the filing of claims for damages within ninety days and thereby denies equality to owners of property in municipalities, counties, etc., named in the Act, in that it imposes upon them the burden of filing claims.

(10) Act 5149 is void as against public policy, due process and equality before the law in that it permits the Board of Supervisors to delegate its power to compromise a claim to a third party—a specially employed attorney.

The Statute Drawn in Question.

This case, as it relates to the statute drawn in question may, we think, be regarded as *sui generis*. Section 1 of the statute in intent and purpose is similar to provisions frequently found in city charters. Otherwise, unless as progeny thereof, which our examination has failed to discover, there is not another similar general statute in the United States. It is in fact a combination statute, by which in the first section thereof the right of recovery of damages by a suit is conferred in a class of cases in which no right of action would exist unless conferred by statute. Also, in Section 1 a limited period of time is prescribed in which this conferred right of action may be exercised. Section 2 concerns the duties of the attorney for the municipality, county or school district as the case may be with reference to the defending of suits, and the section further provides for the employment of special counsel whose fees are made a lawful charge against municipalities, cities and counties, and school districts. Section 3 provides for insurance against damages arising under Section 1, and for payment of premiums to insurance companies. Section 4 is the sequel to the special attorney provision in Section 2. Section 4 is

made to provide that such specially appointed attorney shall approve the terms of any compromise of a claim by any municipalities, city and county, or school district. [Act 5149 set forth in Appendix.]

As shown by the California cases hereinafter cited, causes of action to recover compensation for private property taken for public use were enforced by common law actions for many years before the enactment of Act 5149 in 1931.

The erroneous application of this statute to the cause of action stated in the complaint is a grave injustice and raises an important Federal question not heretofore decided.

ARGUMENT.

The diversion of a county of flood waters on to plaintiffs' lands to their serious damages constituted a taking in violation of Section One of the Fourteenth Amendment to the United States Constitution.

The leading case as to unlawful taking under a Constitutional due process clause is *Pumpelly* v. *Green Bay M. Canal Co.*, 13 Wall. 166, 181, 20 L. Ed. 557, 561 reading:

> "But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this county, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.
>
> "We are, therefore, of opinion that the second plea set up no valid defense, and that the demurrer to it should have been sustained" (20 Law Ed., p. 561).

The first application of the Fourteenth Amendment due process clause to a case where private property had been damaged by the diversion of a stream of water is that of *Hopkins* v. *Clemson Agricultural College,* 226 U. S. pages 636-649, 55 L. Ed., pp. 890-987.

This case is approved in *Perkins* v. *Blauth,* 163 Cal. 787, 899-0, 127 Pac. 52, 53 which held the trustees of a reclamation district liable to the land owner for injury of flooding.

United States v. *Cress,* 243 U. S. 316, 61 L. Ed. 746, holds that it constituted a taking for which compensation must be paid, where the Government constructed and maintained in aid of navigation certain locks and dams whereby the level of the rivers were raised along certain stretches rendering them, to the extent of the raising, artificial canals instead of natural waterways.

Act 5149 construed by the District Court of Appeal to bar petitioners' action to recover compensation for the damaging and taking of their private property for public use is confiscatory and deprives petitioners of their property without due process of law, as prohibited by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The heart of the statute, repugnant as petitioners believe, to the Constitution and against which petitioners mainly direct their attention, is the provision in Section 1 thereof to the effect that a claimant whose property has been injured on "any public street, highway, building, park, grounds, works or property" shall file a verified claim for damages with the proper legislative body within ninety days after the "accident" has occurred.

If it may be assumed, for the purpose of argument, at this point, that the statute has any application whatever to injuries which do not occur in or on the public places men-

tioned in the statute, the statute should be adjudged as repugnant to the due process clause of the Fourteenth Amendment as prescribing a period of time so short that it is impossible to ascertain the amount of damages in dollars to agricultural property—in this instance an orange grove, and incidental thereto it being impossible to ascertain the extent of time required and the cost of restoration of the land within the limited period of ninety days.

Paragraph VII of the complaint alleges the character of the damages to the trees of the orchard and facts to show that such damages could not be ascertained before the date the claim was filed and that even at that time the further development of impairment to the trees that would ensue could not be known (R. 6). The claim was filed December 28, 1938, nine months and twenty-six days after March 2, 1938, the date of the storm.

An examination of petitioners' claim (R. 9-27) will show the labor of restoration work began March 7, 1938, and was completed October 29, 1938 (R. 26) seven months and twenty-seven days after the date of the injuries, at a cost of $4,199.09 (R. 27). Petitioners suggest to the court that an examination of the character of the work done and the day by day progress thereof will eliminate any question concerning the possibility of filing an itemized, verified or any other kind of claim based upon facts within ninety days.

The case of *Lamb* v. *Powder River Live Stock Co.*, C. C. A. (8th Cir.) 132 Fed. 434-444, involved a statute of the State of Colorado, which provided that an action on a judgment rendered without the state which accrued more than six years prior to the commencement of the action on the judgment, must be commenced within three months after the rendition of the judgment. The decision in the case was written by Judge Vandeventer and constitutes a treatise on the question as to the constitutionality of a short statute of limitation. At p. 439 the court said:

"Perhaps no better rule as to what is a reasonable time can be laid down than that it must be of sufficient duration to afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate. In the words of Mr. Justice Shires in Wilson *v.* Iseminger, supra:

'A statute could not bar the existing rights of claimants without affording this opportunity. If it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.'"

Again at the same page the court said:

"To the same effect is Price *v.* Hopkins, *supra,* where it was said by Judge Cooley:

'It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought; * * * and a statute that fails to do this cannot possibly be sustained as a law of limitation, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.'

Not only is a right of action which springs from contract properly within the protection of the Fourteenth Amendment to the National Constitution, but any statute which denies, unreasonably restricts, or oppressively burdens the exercise of a right of action springing from a prior contract, impairs its obligation within the prohibition of the Constitution."

Again, at p. 441 the court said:

"Thus, from whatever point the shortened limitation in the act of 1895 is considered, the question arises whether it is reasonable. No reported decision has come under our observation which sustains a like limitation."

And again at p. 442 the court said:

> "It is usual in prescribing periods of limitation to adjust the time to the special nature of the rights of action to be affected, the situation of the parties, and other surrounding circumstances. A single period cannot be fixed for all cases, because what would be reasonable in one class of cases would be entirely unreasonable in another."

In considering what a reasonable period may be, within the meaning of the above decision, for the filing of claims against a county in cases of this kind, a yardstick may be found in the Code of Civil Procedure, Secs. 335-338.

> (Sec. 335) "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: (Enacted 1872) * * *"
>
> (Sec. 338) "Within three years.
>
> 1. * * *
> 2. An action for trespass upon or injury to real property."

In other words, the legislature has deemed a three-year period as being necessary to cover cases involving injuries to real property, and inasmuch as the filing of a claim under either Act 5149 or Sec. 4075 Political Code is in essence the beginning of an action, a corresponding time should be allowed for the filing of such claim, or if the emergencies of counties require a shorter period, the one-year period provided by Sec. 4075 would be more in line with Sec. 338 Code of Civil Procedure and more reasonable than the ninety-day period required by Act 5149.

Perhaps the legislature in enacting Act 5149 gave less consideration to the rights of a claimant whose property might be destroyed than to some of the other notable features of the Act.

As to the decision being in error in holding contrary to petitioners' contention that the time for filing claims under Act 5149 does not begin to run until the damages are ascertainable, we submit the following:

Crawford v. *Duncan*, 1 Cal. App. 647;
Dufell v. *State Superior Court New York Appellate Division*, 189 N. Y. Supp. p. 7593;
Reed v. *State*, 108 N. Y. 407, 414, 15 N. W. 735-738;
Middlekamp v. *Bessemer Irrigation Ditch Co.*, 46 Cal. 102, 103 Pac. pp. 280-286;
Durham v. *City of Spokane*, 68 Pac. 386;
Saunders v. *City of Boston*, 167 Mass. 595, 46 N. E. 98, Second trial 53 N. E. 822.

It constituted further violation of the due process and equal protection of the law provisions of the United States constitutional amendment to reject plaintiffs' claim and adjudge against it on the basis that it was not filed within the time provided by Act 5149, Deering's General Laws of California (Stats. 1931), p. 2475. The Act, if applicable, is itself unconstitutional as an unreasonable restriction of petitioners' constitutional rights.

A statute of limitations such as Act 5149 is not applicable to plaintiffs' constitutional right to recover just compensation for their land taken by the county by the diversion upon it of flood waters.

That statutes of limitations are not applicable to a suit to recover restitution or compensation from a county under the due process clause for property taken by it without authority we rely in part upon.

The Board of Commissioners of Jackson County, Kansas v. *United States*, (10 Cir.) 100 F. (2d) 929. That case was heard on certiorari by the Supreme Court and the decision modified only as to payment of interest but not as to the

right of recovery of the principle sum regardless of the statute of limitations of the State.

That was a suit by the government on behalf of an Indian to recover back taxes imposed upon the lands allotted to her.

The State statute provided that claims for taxes should be barred unless filed with the Board on or before a certain date. This statute was held to be merely a statute of limitations and that it did not apply to a suit by the United States in a sovereign capacity and as guardian of an Indian ward to recover back taxes wrongfully imposed on the lands of an allottee. The Court held that neither a general or specific statute of limitations is applicable to such a suit. The Court said on page 936, that in the present case

> "Recovery cannot be limited by state statute or decision when it would operate to deprive the United States and its Indian wards of the full restitution or compensation to which they are entitled under the Fifth or Fourteenth Amendments to the Constitution of the United States, U. S. C. A. Const. Amends. 5, 14. Ward *v.* Love County, *supra* page 24, 40 S. Ct. 419, and Board of Supervisors of Mercer County *v.* Cowles, 74 U. S. 118, 19 L. Ed. 86."

Ward v. *Love County,* 253 U. S. 17, 40 S. Ct. 419, 64 L. Ed. 751, was another case where an Indian allottee was suing to recover back taxes paid under protest. The Court said on page 759, quoting from earlier decisions:

> " 'The obligation to do justice rests upon all persons natural or artificial and if a county obtains the money or property of others without authority, the law, independent of any statute will compel restitution or compensation.' "

That the improper application of a statute of limitations in and of itself raises a Federal question of substance we

refer to *Home Insurance Company* v. *Dick*, 281 U. S. 397, 74 L. Ed. 926. That case holds that Federal questions of substance are raised by the objection that a State statute declaring invalid any contractual limitation of the right to sue to a shorter period than two years, as applied to contracts made and to be performed outside the State violates the Federal Constitution.

This holding is applicable to the situation in our case insofar as it deals with improperly applying a certain statute of limitations.

The Court said on page 933:

> "The Texas statute as here construed and applied deprives the garnishees of property without due process of law."

The case also held it sufficient to give the Supreme Court jurisdiction over an appeal from a decision of the highest court of the State that a Federal question is properly raised where it was passed upon adversely to the claim of unconstitutionality.

This case followed in *Hartford A. & I. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178, holding similarly that a State may not, without violating the due process clause of the Federal Constitution, apply its own statute of limitation nullifying any contractual limitations of the time for giving notice of the claim.

Petitioners contend that the California statute as "construed and applied" by the decision of the District Court of Appeal, deprives petitioners their property without due process of law.

Act 5149 Does Not Confer the Right to Recover Compensation for Property Taken for Public Use and Cannot Restrict Such Right.

The opinion of the California District Court of Appeal states:

> "By failing to comply with the procedure established by the legislature, plaintiffs are deemed to have waived their right to enforce payment" (R. 35),

citing cases, and much more is said in the opinion to the effect that plaintiffs derive their right to sue solely from the statute.

In 12 C. J., Sec. 114 (6), p. 732, the rule as to constitutions being self-executing is as follows:

> "A constitutional prohibition against taking private property for public use without just compensation therefor is self-executing, even though the method of ascertaining such compensation is left for legislative determination. When the constitution forbids damage to private property, and points out no remedy and no statute affords one for the invasion of the right of property thus secured, the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance."

Sec. 14 of Article I, Constitution of California, prohibits such taking for public use without payment of just compensation.

The opinion holds that the right action in this case rests upon the provisions of Act 5619, Deering's General Laws (Stats. 1923), p. 675, Section 2, and the procedure thereon upon Act 5149. Your petitioners controvert the statement.

Federal cases have been prosecuted to judgment without State laws conferring the right or in aid of the procedure, as follows:

Hopkins v. *Clemson, supra;*

United States v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539;
Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393, 67 L. Ed. 322-329.

For many years prior to the enactment of Act 5149 actions have been maintained in this State by virtue of the self-executing power of the State Constitution for the recovery of damages sustained where private property has been taken for public use, as in the case at bar. Among such cases may be noted:

Coniff v. *San Francisco*, 67 Cal. 49;
Elliott v. *Los Angeles County*, 183 Cal. 473;
Perkins v. *Blauth*, 163 Cal. 782-793.

Act 5149 did not then, and does not now, apply.

Petitioners' right of action is protected by the 14th Amendment to the Federal Constitution, and Act 5149 conferred nothing on them, and cannot take a constitutional right from them.

Act 5149 confers the right of action upon a certain class of cases which otherwise would not exist, such as accidents in and on public streets, highways, etc., mentioned in the statute. As to those cases the doctrine announced by the court is correct, but as to cases where the right is conferred and protected by either the Federal due process clause of the 14th Amendment or by Article 1, Sections 13 and 14 of the Constitution of California, Act 5149 can add nothing to the constitutional mandate. A common law action provides the remedy.

Act 5149 Was Not Designed to Apply to Cases of Taking for Public Use Without Compensation, and was Therefore Improperly Applied in Violation of Petitioners' Constitutional Rights.

No reasonable construction of the language of Act 5149 could make it apply to the facts in this case—to petitioners'

private property far removed from the public places to which the State statute was restricted.

The act complained of was a deliberate taking of property by the county and the limitations and provisions of Act 5149 do not apply, and therefore there was no requirement for a verified claim for damages to be presented in writing to the Board of Supervisors within ninety days. No accident caused the diversion, and no public street, highway, park, grounds, works or property were involved and therefore the ruling on demurrer was erroneous. The damage to plaintiffs' orchard was not caused by anything within the meaning or purview of Act 5149.

The court erred in holding that the word "accident" as used in the statute should be construed as including the word "injury", thereby enlarging the purpose of the legislature to deal with accident so as to include intentional acts, and a taking of property without compensation by diverting a stream from its natural course.

Petitioners assert that in enacting Act 5149, the legislature had in mind such accidents as usually occur to persons or personal property in the use of highways, bridges and public places.

> "Strictly speaking an accident is an occurrence to which human fault does not contribute, and the term has accordingly been variously defined as an unusual and unexpected event happening without negligence; a casualty which could not be prevented by ordinary care and diligence * * *."

Vol. I, C. J., Sec. (5) E., p. 392; *Schmidt* v. *Indiana Travelers Accident Assn.*, 85 N. E. 1032; *Briscoe* v. *Metropolitan St. Ry. Co.*, 120 S. W. 1162.

The use in the statute of the word "accident" and naming therein of the places where accidents may occur to incur liability against the corporate entity, excludes injuries

which are not accidental but result from a proximate cause—an intentional act and also those occurring on places other than those named in the statute, to-wit, injuries on and to private property. The statute is penal in its nature. It is a statute of limitation that deprives the owner of his real property for the benefit of the State and of his constitutional right to have his day in court. The legal maxim *"Expressio unius exclusio alterius"* is especially applicable as authority for the restriction of Act 5149 to its legitimate scope and field.

Act 5149 is Void as Against Public Policy as Permitting Control of a County Board's Powers to Be Exercised by a Third Person.

Act 5149, General Laws, Section 2, authorizes the employment of special counsel, Section 3 provides for insurance, and Section 4 prevents compromise without consent for special counsel.

The act is vicious in that it thus permits special counsel of the insurance company, if he should be selected as special counsel for a county, to prevent a settlement and conduct the defense of the litigations, the tendency being to prevent a fair hearing before the board of supervisors and deprive claimants of the property without compensation under the technical defense of limitations.

§ 4003 of the Political Code of California gives the county power to sue "and be sued"; that power may not be delegated or controlled by third persons.

Act 5149 and the Decision Below Deprives Petitioners of the Equal Protection of the Laws if Applied to Flood Control Districts in Some Counties and Not in Others.

Act 5149 does not mention flood control districts. The decision applies the act to a cause of action affecting land in

Ventura County. For a like cause of action concerning land in Los Angeles County where there are flood control districts [created by general law, Deering's General Laws Act 4463] the act would not apply. In other words, the owner of land in Los Angeles County would be exempt from the requirements to file a claim within ninety days. Flood control districts are not mentioned in the statute, and the owner of land in Ventura County would be required to comply with the statutes. In this manner, he would be deprived of the equal protection of the law. The owner of land in the flood control districts of Los Angeles County would, if required to file a claim at all, file the same under the General Law, section 4075 of the Political Code, and would have one year within which to perform that act.

Section 4075 of the Political Code of the State of California provides that a Board of Supervisors must not hear or supervise any claim except it be prepared with the detail provided in the statute. It allows a year after the last item of the account or claim accrued in which to file the claim. The statute also provides:

> "*Presentation of claims.* All claims against any county or against any public officer in his official capacity payable out of any public fund under the control of the board of supervisors, whether such claim be founded upon contract, express or implied, or upon any act or omission of the county or any officer or employee thereof, or of any district or public entity the funds of which are controlled by the boards of supervisors, or of any officer or employee of any such district or public entity, shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim, and no suit shall be brought on any such claim until said claim has been presented as herein * * *." (Statute set forth in appendix, p. 33.)

Petitioners fully complied with the foregoing statute, which is not subject to the criticism that Act 5149 is when ap-

plied to this case to-wit: Act 5149 does not equally apply to the same causes of action in different localities in California. Section 4075 of the Political Code does so equally and generally apply.

Conclusion.

For the foregoing reasons the petition should be granted.

Respectfully submitted,

ROBERT M. CLARKE,
MILTON K. YOUNG,
CHARLES C. MONTGOMERY,
Attorneys for Petitioners.

APPENDIX.

Act 5149. Deering's General Laws [Stats. 1931, P. 2475].

An act relating to the liability in damages of municipalities, counties, cities and counties, and school districts, in the case of injuries to persons or property resulting from the defective or dangerous condition of public streets, highways, bridges, buildings, works or property; prescribing the duties of the officers thereof in such cases, and authorizing such public or quasi-public corporations to take out and pay for insurance to protect them against such liability.

1. Claim for Damages Suffered on Public Property. Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received.

2. Duty of Attorney for Municipality, etc. Whenever any suit for damages is brought against any municipality, county, city and county, or school district on account of injuries to persons or property, alleged to have been received as a result of the dangerous or defective condition of any public streets, highway, building, park, grounds, works or property, it shall be the duty of the attorney for such municipality, county, city and county, or school district, as the case may be, to act as counsel in defense of such suit, unless lawful provision has been made for the employment of other counsel in connection therewith; and the fees and expenses involved therein shall be a lawful charge against such municipality, county, city and county, or school district, as the case may be.

3. Municipalities, etc., May Insure. Municipalities, counties, cities and counties, or school districts, may insure against any liability, other than a liability which may be in-

sured against under the provisions of the workmen's compensation insurance and safety act, or under the workmen's compensation insurance and safety act of 1917, for injuries or damages resulting from the dangerous or defective condition of public streets, highways, buildings, parks, grounds, works and property, either by self-insurance, or in any insurance company authorized to transact the business of such insurance in the State of California; and the premium for such insurance shall be a proper charge against the public treasury of such municipality, county, city and county, or school district, as the case may be.

4. Payment or Compromise of Claims. In any case where legal liability is admitted or disputed the municipality, county, city and county, or school district may pay any bona fide claim or compromise any such disputed claim out of public funds, provided that in any such compromise the district attorney, city attorney, county counsel, or attorney having charge of such matters approves the terms of such compromise.

5. Definitions. Wherever the words "person" or "public" are used in this act, such words shall be deemed to include any pupil attending the public schools of any school or high school district.

Section 4075 of the Political Code of California, a general law with reference to the filing of claims against counties and districts therein, allowing one year for the filing thereof, provides as follows:

"The board of supervisors must not hear or consider any claim in favor of any public officer, person, corporation, company, or association against the county, nor shall the board credit or allow any claim or bill against the county or district fund, unless the same be itemized, giving names, dates and particular service rendered, character of process served, upon whom, distance traveled, where and when, character of work done, number of days engaged, supplies or materials furnished, to whom, and quantity and price paid therefor, duly verified to be correct, and that the amount claimed is justly due, and is presented and filed with the clerk of the board, or with the auditor, according to the procedure prescribed for the particular county,

within a year after the last item of the account or claim accrued. If, in case of any claim which requires itemizing, the board do not hear or consider the same because it is not itemized, they shall cause notice to be given to the claimant or his attorney of that fact and give time to have the claim itemized and reverified; provided that the verification of claims may be dispensed with as provided in section 4076 of this code."

"*Presentation of claims.* All claims against any county or against any public officer in his official capacity payable out of any public fund under the control of the board of supervisors, whether such claim be founded upon contract, express or implied, or upon any act or omission of the county or any officer or employee thereof, or of any district or public entity the funds of which are controlled by the board of supervisors, or of any officer or employee of any such district or public entity, shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim, and no suit shall be brought on any such claim until said claim has been presented as herein provided and rejected in whole or in part. In presenting any claim not founded upon contract full details as to the nature of the claim, the time and place when and where it arose, the public property and public officers or employees alleged to be at fault, the nature, *extent and amount of the injury or damage claimed,* and all other details necessary to a full consideration of the merit and legality of such claim shall be stated in writing signed by the claimant or someone authorized by him, and in all other respects such claims shall be presented and acted upon in the same manner as claims founded upon contracts. (Added by Stats. 1907, p. 379; Amended by Stats. 1913, p. 835; Stats. 1915, p. 1185; Stats. 1931, p. 197.)" (Italics ours.)

IN THE

Supreme Court of the United States

October Term, 1940
No. 580

MILTON K. YOUNG and MELISSA E. YOUNG,
Petitioners,

vs.

COUNTY OF VENTURA, a Body Politic Incorporate and a Political Subdivision of the State of California.

Answer to Petition for Writ of Certiorari to the District Court of Appeal, State of California, Second Appellate District, Division Two and Brief in Support Thereof.

M. ARTHUR WATTS,
District Attorney of Ventura County,
JULIAN G. HARTMAN,
Deputy District Attorney of Ventura County,
Court House, Ventura, California,
H. F. ORR,
Bank of America Building, Ventura, California,
Attorneys for Respondent, County of Ventura.

SUBJECT INDEX.

PAGE

Answer to Petition for Writ of Certiorari to the District Court of Appeal, State of California, Second Appellate District, Division Two 1

Jurisdictional Statement 2

Statement of the Case 3

Reasons Relied Upon for Denial of Writ of Certiorari 5

Conclusion 6

Brief in Support of Answer to Petition for Writ of Certiorari 9

Argument 10

I.

The complaint does not state a cause of action for the reason that petitioners did not plead the filing of a verified claim within ninety (90) days after the alleged damage took place (Section 1, Act 5149, Deering's General Laws, 1937, Stats. 1931, page 2475) 10

A. A storm ditch constructed and maintained by a county is a "public works" within the meaning of Act 5149, Deering's General Laws, etc 11

B. The term "accident" as used in Act 5149 must be construed to mean "damage" under the circumstances of this case 16

C. The filing of a claim for damages coming within the scope of Act 5149 within ninety (90) days after such damages occurred is a mandatory procedural step, and until the filing of such a claim within such ninety (90) day period the court does not acquire jurisdiction to hear and determine the cause 17

PAGE

D. The requirement that such a claim be filed may not be waived by the board of supervisors of the county, nor does the alleged disability of the petitioners extend the period..... 21

E. From the statement of facts contained in petitioners' complaint, petitioners have not pleaded and are now unable to plead or prove the filing of such a claim within the period provided by Act 5149..... 25

F. Act 5149, being specific and subsequent in enactment, is controlling over Political Code, Section 4075..... 26

II.

Act 5149 does not violate either the Thirteenth or Fourteenth Sections of Article I of the Constitution of California or the Fifth or Fourteenth Amendments of the Constitution of the United States..... 30

A. Act 5149 does not violate Section 14 or Article I of the Constitution of California..... 30

B. Act 5149 does not violate the provisions of Section 13, Article I, of the Constitution of California..... 36

C. The Fifth Amendment of the Constitution of the United States does not apply to the various states, but is a limitation upon the Federal Government only and, hence, is not here applicable..... 37

D. The contention that Act 5149 is void as against public policy and due process in that it permits an alleged delegation of authority to approve or reject claims to insurance carriers..... 38

E. Act 5149 does not violate any provision of Section 1 of the Fourteenth Amendment of the Constitution of the United States..... 40

Conclusion 49

INDEX TO APPENDIX.

PAGE

Deering's General Laws, Act 5149 (Stats. 1931), Secs. 1 to 5.... 1

Deering's Political Code of California, Sec. 4075..... 3

Deering's Political Code of California, Sec. 4078..... 5

Deering's Code of Civil Procedure of California, Sec. 342..... 5

Treadwell's Constitution of California, Art. I, Secs. 13 and 14.... 6

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Alden v. Alameda County, 43 Cal. 270	35
Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712	5, 34
Bigelow v. City of Los Angeles, 141 Cal. 503, 75 Pac. 111	35
Chapman v. City of Fullerton, 90 Cal. App. 463	24, 38
City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 Pac. 298	34, 44
Cooper v. County of Butte, 17 Cal. App. (2d) 43, 61 Pac. (2d) 516	6, 20, 26, 39
Crescent Wharf Co. v. City of Los Angeles, 207 Cal. 430, 278 Pac. 1028	5, 18, 19, 32, 33, 34, 40, 41
Dayton v. City of Asheville, 185 N. C. 12, 115 S. E. 827	28
Gapin v. City of Los Angeles, 34 Cal. App. (2d) 660, 94 Pac. (2d) 359	6, 21, 44
Hathaway v. Merchants' Loan and Trust Co., 75 N. E. 1060	5
Hopkins v. Clemson Agric. College, 221 U. S. 636, 55 L. Ed. 890	31
Johnson v. City of Glendale, 12 Cal. App. (2d) 389, 55 Pac. (2d) 580	5, 20, 22, 23, 24, 38, 49
Kahrs v. County of Los Angeles, 28 Cal. App. (2d) 46, 82 Pac. (2d) 29	6, 11, 12, 15, 17, 20, 27
Lamb v. Powder River Live Stock Co. (8th Cir.), 132 Fed. 434	42
Los Angeles Athletic Club v. Long Beach, 128 Cal. App. 427, 17 Pac. (2d) 1061	20
McCann v. Sierra County, 7 Cal. 121	35, 36
Metropolitan Life Insurance Co. v. Rolph, 184 Cal. 557, 194 Pac. 1005	35
Myers v. Hopland U. E. School District, 6 Cal. App. (2d) 590, 44 Pac. (2d) 654	5, 20, 21, 38
Nebbia v. New York, 291 U. S. 502, 78 L. Ed. 940	37
Norton v. Pomona, 5 Cal. (2d) 54, 53 Pac. (2d) 952	20

PAGE

Phillips v. County of Los Angeles, 140 Cal. App. 78, 35 Pac. (2d) 187.....20, 23, 46

Pumpelly v. Green Bay & M. Canal Co., 13 Wall. 166, 20 L. Ed. 557 .....31, 32

Rhoda v. Alameda County, 52 Cal. 350..... 35

Spencer v. City of Calipatria, 9 Cal. App. (2d) 267, 49 Pac. (2d) 320.....5, 20, 24, 38

Spencer v. City of Los Angeles, 180 Cal. 103, 179 Pac. 163..... 35

Strath v. City of Santa Rosa, 19 Cal. App. (2d) 382, 65 Pac. (2d) 894.....6, 21

Thompson v. County of Los Angeles, 140 Cal. App. 73, 35 Pac. (2d) 185.....5, 20, 26

Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 Pac. 345.....5, 18, 19, 24, 33, 38

White-Satra v. City of Los Angeles, 14 Cal. App. (2d) 688, 58 Pac. (2d) 933..... 20

Winters v. City of Niagara Falls, 190 N. Y. 198, 82 N. E. 1101.....5, 29, 32, 44, 45, 46

Yonker v. City of San Gabriel, 23 Cal. App. (2d) 556, 73 Pac. (2d) 623.....6, 12, 13, 14, 17, 20, 24, 32, 33, 38, 46

Young v. Ventura County, 102 Cal. App. Dec. 127..... 4

STATUTES.

California Code of Civil Procedure, Sec. 342..... 47

California Constitution, Art. I, Sec. 13.....36, 40, 41

California Constitution, Art. I, Sec. 14.....13, 19, 30, 32, 33

California Political Code, Sec. 4075 .....12, 26

California Political Code, Sec. 4076..... 26

California Political Code, Sec. 4077..... 26

California Political Code, Sec. 4078 .....26, 47

Deering's General Laws of California, Act 5149, Chap. 1167 (Stats. 1931), p. 2475.....2, 5, 10, 27

PAGE

Deering's General Laws, Act 5149, Sec. 1 ..... 11, 13, 16, 21, 24, 30, 42, 43, 49

United States Constitution, Fifth Amendment 37

United States Constitution, Fourteenth Amendment 36, 40, 41

TEXTBOOKS AND ENCYCLOPEDIAS.

Black's Legal Dictionary, 2d Ed 15, 16

12 Corpus Juris, Sec. 956, p. 1188 44

12 Corpus Juris, Sec. 959, p. 1194 37

16 Corpus Juris Secundum, Sec. 567, p. 1140 44

16 Corpus Juris Secundum, Sec. 568-b, p. 1146 37

16 Corpus Juris Secundum, Sec. 569, p. 1157 48

Webster's New International Dictionary 16

IN THE

Supreme Court of the United States

October Term, 1940
No. 580

MILTON K. YOUNG and MELISSA E. YOUNG,
Petitioners,

vs.

COUNTY OF VENTURA, a Body Politic Incorporate and a Political Subdivision of the State of California.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your respondent, County of Ventura, a body politic and corporate and a political subdivision of the State of California, respectfully prays:

That petitioners' prayer that a Writ of Certiorari be issued to the District Court of Appeal, Second Appellate District, State of California, to review the judgment of said Court of Appeal affirming the decree of the Superior Court of the State of California, in and for the County of Ventura, in that certain action between the above named parties, which is disclosed by the certified record on file in this proceeding, be denied.

Jurisdictional Statement.

The decision rendered herein by the District Court of Appeal, Second Appellate District, State of California, on the 1st day of July, 1940, wherein the application of the State Statute, Act 5149, Deering's General Laws (Stats. 1931, page 2475), (set forth in full in the Appendix to petition herein, page 1) did not deprive petitioners of their property and property rights in violation of due process and equality provisions of the Fourteenth Amendment of the Constitution of the United States.

Said Statute so applied is not repugnant to the Constitution of the United States. The Statute is applicable to petitioners' case, application thereof under the facts alleged in petitioners' complaint will not violate the due process and equality provisions of the Fourteenth Amendment of the Constitution of the United States.

Respondent denies that petitioners have been denied due process and equality as guaranteed by the Fourteenth Amendment of the Constitution of the United States, but on the other hand, alleges that the petitioners have not been deprived of any rights whatsoever, due process and equality being afforded by Act 5149, Deering's General Laws (Stats. 1931, page 2475), and that petitioners waived the same by their failure to avail themselves of the procedural steps thereof within the time provided by such Statute.

Statement of the Case.

(In order to assist the Court in locating the parcels of real property in respect to the location of the storm ditch here involved, and other objects referred to in the petition, respondent has taken the liberty of appending hereto [Appendix p. 8] a map or plat correctly designating the location of the items mentioned in petitioners' complaint.)

Petitioners, in their complaint filed in the Superior Court of the County of Ventura, State of California, a copy of which complaint is set forth in the transcript of the record in this case [R. 1-9, incl.], alleged that they were the owners of certain orchard land in the County of Ventura, near the town of Piru [R. 1;]; that for more than twenty-two (22) years prior to March 2nd, 1938, the County of Ventura, defendant in said action, had assumed the management and control of storm waters flowing down from Nigger Canyon [R. 2], and that some ten (10) or eleven (11) years prior to March 2nd, 1938, the defendant County of Ventura deepened and widened a storm ditch in the Canyon [R. 3] and constructed a steel and wire revetment [R. 4], thereby diverting storm waters from their natural channel [R. 4]; that the natural channel was abandoned by defendant and the diverted waters then flowed in a storm ditch along the easterly boundary of petitioners' property [R. 5]; petitioners had maintained an embankment along their property on the easterly side adjacent to Nigger Canyon to protect their property from the waters of the Canyon [R. 2]; that the new channel constructed by the defendant was upon privately owned property [R. 5]; that notwithstanding repeated written complaints to defendant to discontinue the use of the new channel, defendant failed to do so [R. 5]; that on March 2nd, 1938, torrential rains fell in the area, and the ditch

of which complaint is made carried the heavy run-off with force and violence from Nigger Canyon against petitioners' embankment, flooding petitioners' land to their serious damage [R. 6]; that nine (9) months and twenty-eight (28) days thereafter, to-wit: December 28th, 1938, petitioners filed with the Board of Supervisors of the County of Ventura, State of California, a claim for damages to petitioners' orchard alleged to have been caused by the said torrential rains occurring on March 2nd, 1938 [R. 7], and thereafter, on the 17th day of January, 1939, said claim was rejected by the Board of Supervisors. Thereafter, on February 27th, 1939, petitioners filed their complaint in the Superior Court of the County of Ventura, State of California, against the County of Ventura, the respondent herein [R. 1]. Thereafter on March 11th, 1939, the defendant, County of Ventura, respondent herein, filed its demurrer [R. 27], which demurrer was regularly heard and submitted and the Judge of the Superior Court on the 20th day of November, 1939, sustained said demurrer without leave to amend [R. 30] and judgment that plaintiffs take nothing by their action was entered December 7th, 1939 [R. 31]. Notice of appeal to the Supreme Court of the State of California from said judgment was served and filed December 20th, 1939 [R. 31], and the case was transferred for hearing by the Supreme Court of the State of California to the District Court of Appeal, Second Appellate District, State of California, which, in due course, rendered its opinion affirming the judgment of the Superior Court of the County of Ventura (*Young v. Ventura Co.*, 102 Cal. App. Dec. 127). Rehearing of said cause by the Supreme Court after the decision of the District Court of Appeal was denied by the Supreme Court on August 29th, 1940, and has now become final. [R. 32 to 38, incl.]

Reasons Relied Upon for Denial of Writ of Certiorari.

1. Deering's General Laws, Act 5149 (Statutes of 1931, page 2475), is not a statute of limitations, but is an act providing the procedure regulating the filing of claims for damages alleged to have resulted from a dangerous or defective condition of public works, grounds or property. The claimant must comply with the conditions precedent set forth in this statute before he may bring suit. This act confers jurisdiction, and fixes a time within which it may be exercised. It does not relate to the commencement of actions. It does, however, provide the due process and equalities provided by the Fourteenth Amendment of the Constitution of the United States.

Winters v. City of Niagara Falls, 190 N. Y. 198, 82 N. E. 1101;

Hathaway v. Merchants' Loan and Trust Company, 75 N. E. 1060;

Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712;

Western Salt Company v. City of San Diego, 181 Cal. 696, 186 Pac. 345;

Crescent Wharf Company v. City of Los Angeles, 207 Cal. 430, 278 Pac. 1028;

Thompson v. County of Los Angeles, 140 Cal. App. 73, 35 Pac. (2d) 185;

Myers v. Hopland U. E. School District, 6 Cal. App. (2d) 590, 44 Pac. (2d) 654;

Spencer v. City of Calipatria, 9 Cal. App. (2d) 267, 49 Pac. (2d) 320;

Johnson v. City of Glendale, 12 Cal. App. (2d) 389, 55 Pac. (2d) 580;

Cooper v. County of Butte, 17 Cal. App. (2d) 43, 61 Pac. (2d) 516;

Strath v. City of Santa Rosa, 19 Cal. App. (2d) 382, 65 Pac. (2d) 894;

Yonker v. City of San Gabriel, 23 Cal. App. (2d) 556, 73 Pac. (2d) 623;

Kahrs v. County of Los Angeles, 28 Cal. App. (2d) 46, 82 Pac. (2d) 29;

Gapin v. City of Los Angeles, 34 Cal. App. (2d) 660, 94 Pac. (2d) 359.

Conclusion

It is respectfully submitted that inasmuch as the question of due process and equal protection under the Fourteenth Amendment of the Constitution of the United States was pointedly raised in petitioners' complaint in the lower court, in the printed briefs on appeal to the Courts of Appeal of the State of California, both by appellant and respondent, and again in the oral argument before said Courts, that issue was duly considered by the District Court of Appeal in its decision now questioned by petitioners, and was considered by the Supreme Court of California before denying the petition for rehearing in that Court.

And there can be no doubt that the District Court of Appeal must have had in mind the questions now raised by respondent in regard to the due process and equality clauses of the Fourteenth Amendment when said Court in its opinion stated as follows [R. 34]:

> "Plaintiffs' point that compliance with the ninety-day period for filing their claim is violative of their *constitutional rights* was passed upon adversely to

> their contention in Yonker v. City of San Gabriel, *supra,* where the facts presented a situation very similar to that now before us." (Italics added.)

and again stated [R. 36]:

> "Plaintiffs cannot successfully argue that by the statutory requirement of filing a claim they were deprived of due process of law. *The legislature has furnished due process to them but they did not avail themselves of it.*" (Italics added.)

We respectfully submit that petitioners have not been denied any of the rights provided by the Fourteenth Amendment of the Constitution of the United States and that the prayer for Writ of Certiorari should be denied.

M. ARTHUR WAITE,
District Attorney of Ventura County;

JULIEN G. HATHWAY,
Deputy District Attorney of Ventura County;

H. F. ORR,
Attorneys for Respondent, County of Ventura.

IN THE

Supreme Court of the United States

October Term, 1940

No. 580

MILTON K. YOUNG and MELISSA E. YOUNG,

Petitioners,

vs.

COUNTY OF VENTURA, a Body Politic Incorporate and a Political Subdivision of the State of California.

BRIEF IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF CERTIORARI.

A concise statement of the case, and reasons relied upon by respondent for denial of the Writ are set out in the Answer to Petition for Writ of Certiorari.

ARGUMENT.

The Complaint Does Not State a Cause of Action for the Reason That Petitioners Did Not Plead the Filing of a Verified Claim Within Ninety (90) Days After the Alleged Damage Took Place (Section 1, Act 5149, Deering's General Laws, 1937, Stats. 1931, Page 2475).

(For the sake of brevity, unless otherwise specified, wherever the term "Act 5149" is used, it will be considered as referring to Chap. 1167, Stats. 1931, page 2475, that enactment also being known as Act 5149, Deering's General Laws of California.)

Inasmuch as the demurrer herein is premised upon the failure of petitioners to allege the filing of a verified claim within ninety (90) days as required by section 1 of Act 5149, it is thought well at this point to set out section 1 thereof in full.

Act 5149, Deering's General Laws of California, Chap. 1167, Stats. 1931, page 2475:

> *"Sec. 1. Claim for damages suffered on public property.* Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claims shall specify the name and address of the complainant, the date and place of the accident and the extent of the injuries or damages received." [Statute in full set out in Appendix, p. 1.]

It is respectfully submitted that since the enactment of Act 5149 it has been consistently held by the District Court of Appeal and the Supreme Court of California that the requirements thereof relative to the filing of a claim against a city or county within ninety (90) days after such accident has occurred are necessary, mandatory and prerequisite to the maintaining of a suit for recovery against the county, and a complaint which fails to plead the filing of a claim coming within the provisions of section 1 of Act 5149, is subject to general demurrer, and where it appears upon the face of the complaint that the plaintiff is unable to amend to bring his complaint within the scope of said Act 5149, the demurrer should be sustained without leave to amend.

A. A Storm Ditch Constructed and Maintained by a County Is a "Public Works" Within the Meaning of Act 5149, Deering's General Laws, etc.

It will be noted by section 1 of Act 5149, that *"whenever it is claimed that any person has been injured or any property damaged* as a result of the *dangerous or defective condition of any public . . . works or property,"* a claim must be filed within the time therein limited. The question then arises—is a storm drain or storm ditch for the carrying off of storm waters a public works? It is the contention of the respondent that such a project is unquestionably a public work, within the scope and meaning of section 1 of Act 5149. In this contention the Courts of California undoubtedly concur, as evidenced by the decision of the District Court of Appeal in the recent case of *Kahrs v. County of Los Angeles,* 28 Cal. App. (2d) 46, 82 Pac. (2d) 29 (*decided in August,* 1938).

In that case, while the text does not in so many words state that such a ditch is a public works, the facts of the case and the ruling of the Court thereon do definitely establish the contention of respondent. The facts in the *Kahrs* case were: floods occurring in Los Angeles County and drained through the drainage ditch of a drainage improvement district in that county overflowed, damaging the plaintiff Kahrs. Defendant county demurred on the ground that the plaintiff had not pleaded the filing of a verified claim within the period of ninety (90) days after the damage occurred as provided by Act 5149. Demurrer in that case was sustained without leave to amend, and on appeal the appellant there (as do petitioners here), contended that he was entitled to rely upon section 4075 of the Political Code of the State of California (referring generally to the filing of claims against counties), and that Act 5149 did not apply to the facts of his case. [Section 4075 of the Political Code of the State of California set out in full in Appendix p. 3.] These contentions were overruled by the California District Court of Appeal.

The case of *Yonker v. City of San Gabriel,* decided in 1937, and reported in 23 Cal. App. (2d) 556, 73 Pac. (2d) 623, was another case involving an alleged taking or damaging of property by a municipal corporation. In that case (quoting from page 557 of said opinion):

> "It is alleged in the complaint that the dumping of said oil-impregnated gravel and refuse material was done carelessly and negligently by the servants and employees of the City of San Gabriel. It is further alleged that the *plaintiff gave notice to the defendants of the matters complained of herein,* but that said defendants took no measures to prevent the

injury to plaintiff's premises by reason of the manner in which the oil-impregnated gravel and refuse matter had been dumped upon the abutments aforesaid and took no measures whatever to prevent the waters of said wash from carrying the same down to, over and upon the lands belonging to the plaintiff." (Italics added.)

Swollen by torrential rains, the stream flowing under the bridge washed away, and then deposited the oil-impregnated materials over the sand and gravel beds of the plaintiff Yonker, damaging the same for the purposes theretofore used, *i. e.*, the sand and gravel business. In that case, the plaintiff contended, as do petitioners in this case, that Act 5149 did not apply, that *the damage was a "taking", prohibited by article I, section 14,* of the California Constitution, and that it was not necessary to file a claim within the ninety-day period required by section 1 of Act 5149. (In the *Yonker* case, *supra,* a purported claim was filed within the period of ninety (90) days, but was found to be insufficient.)

The *Yonker* case, *supra,* holds that the act complained of was not a "taking", and that Act 5149 is controlling. In this regard, the Court said (23 Cal. App. (2d) at page 558):

"(1) Responding to the objection that no verified claim was filed as required by law it is the contention of the plaintiff that under section 14 of article I of the Constitution the filing of a verified claim against the City of San Gabriel was unnecessary. The section of the Constitution referred to provides that private property shall not be taken or damaged for public use without just compensation being made therefor. At the time of the dumping of the ma-

> terial herein referred to by the agents of the City of San Gabriel upon the abutments of the Ramona Street bridge no property of the plaintiff was either taken or damaged. The damage, if any, was as the authorities claim, c nsequential, but whether it correctly be denominated consequential or direct, immediate, the record shows no damage resulted from the mere fact of dumping the refuse material upon the abutments referred to, but that subsequently torrential rains occurred, causing an excessive flow in the wash referred to, the waters thereof carrying down the refuse matter upon the property belonging to the plaintiff."

A careful analysis of the facts upon which the *Yonker* case, *supra,* is founded and upon which the petitioners' case is founded, will disclose that the facts of the two cases are, to all intents and purposes, identical. At the time the respondent County built the ditch, diverted the natural flow of water from Nigger Canyon, and "assumed control" of the storm waters therefrom, and the widening and deepening operations were performed, no damage whatever resulted to petitioners, nor was any of their property "taken or damaged", nor was it even invaded in any way. Conceding then for the sake of argument, the allegations of petitioners' complaint, that torrential rains and heavy flow of storm waters here, as in the *Yonker* case, broke over and deposited sand and debris in appellants' orchard, causing damage, but not making the orchard or the land "entirely valueless" as was contended in the *Yonker* case, we submit, the cases are, upon the facts, identical, and it should logically follow that the decision of this Court should follow the rule established in many earlier cases and reiterated in the *Yonker* case.

And in this regard, the case of *Kahrs v. County of Los Angeles, supra,* decided in 1938, cannot be disregarded. While the facts in that case are not stated in clear detail, it sufficiently appears from the decision that the run-off following heavy rains caused the overflow of drainage ditches or canals in Drainage Improvement District No. 1 in Los Angeles County, damaging land and personal property of the plaintiff Kahrs. Contention was made that the act was not controlling in that the heading of section 1 placed thereon by the editor of Deering's Codes reads "Claim for Damages Suffered on Public Property" and that the damage complained of by plaintiff Kahrs occurred on his private property. The decision definitely disposes of this contention and rules that Act 5149 was controlling. It will be noted that this case, so far as the facts are stated in the decision, is a parallel of the case now before the Court.

"Public works" have been defined by Black's Legal Dictionary, Second Edition, as

> "Works, whether of construction or adaptation, undertaken and carried out by the national, state, or municipal authorities, and designed to subserve some purpose of public necessity, use, or convenience; such as public buildings, roads, aqueducts, parks, etc."

Certainly the construction and maintenance of storm drainage ditches and channels by a county to protect public and private property in time of flood is a "public works" within the meaning of Act 5149, and the cases above cited, and ownership of the right of way upon which the public work was located, whether owned in fee or merely an easement for the doing, creating and maintaining of such public works, the ownership is such that the fee or ease-

ment would be classed as "public property" within the meaning of Act 5149. Any damage caused by a dangerous or defective condition of any such works or property would be a damage contemplated by section 1 of Act 5149.

B. THE TERM "ACCIDENT" AS USED IN ACT 5149 MUST BE CONSTRUED TO MEAN "DAMAGE" UNDER THE CIRCUMSTANCES OF THIS CASE.

Counsel has stressed somewhat the fact that Act 5149 states that the claim must be filed within ninety days after the "accident" occurred, and states that the word "accident" as used in the Act does not mean "damage", and that the time within which he must file his claim would not begin to run until the damages could be ascertained.

Webster's New International Dictionary defines "accident" as follows:

> "Accident—a befalling; an event that takes place without one's foresight or expectation; an undesigned, sudden or unexpected event; chance; contingency; often an undesigned and unforeseen occurrence of an affliction or unfortunate character; casualty; mishap; as to die by an accident."

Black's Law Dictionary, 2nd Edition, quoting Wharton gives the following meaning for the word "accident":

> "The meaning to be attached to the word 'accident', in relation to equitable relief, is any unforeseen and undesigned event productive of disadvantage."

At the risk of being deemed repetitious, respondent desires to remind the Court that throughout this case, the same contention has been made. Throughout the case

respondent has contended, and now contends that the damages resulting to petitioners were without "foresight" or "expectation", were "an undesigned, sudden and unexpected event". It is apparent that the term "accident" as used in Act 5149 applies to, and was meant to apply to the state of facts involved in this cause, and the act making no exceptions, the provision requiring the filing of a claim within ninety (90) days applies to petitioners. It was mandatory, and the following cases involving damage to real property by storm waters, so hold, (*Kahrs v. County of Los Angeles, supra; Yonker v. San Gabriel, supra*). Act 5149 not having been complied with by petitioners, the demurrer to their complaint should have been, and was, sustained without leave to amend.

C. The Filing of a Claim for Damages Coming Within the Scope of Act 5149 Within Ninety (90) Days After Such Damages Occurred Is a Mandatory Procedural Step, and Until the Filing of Such a Claim Within Such Ninety (90) Day Period the Court Does Not Acquire Jurisdiction to Hear and Determine the Cause.

The decisions of the District Court of Appeal and of the Supreme Court of California, both before and after the passing of Act 5149, having consistently held that where a statute provides a procedural step as a prerequisite to the filing of a suit, such prerequisite or procedural step must be substantially complied with, and such compliance or substantial compliance must be pleaded or the complaint in any such action fails to state a cause of action, and is subject to general demurrer. And this rule is applicable whether the complaint be one against a city,

county or school district seeking damages for personal injuries, or to recover for the taking or damaging of real property, where the injury or damage complained of is the result of a dangerous or defective condition of any public works, grounds or property.

The leading cases of *Western Salt Co. v. City of San Diego,* 181 Cal. 696, 186 Pac. 345 (1919), and *Crescent Wharf Co. v. City of Los Angeles,* 207 Cal. 430, 278 Pac. 1028 (1929), though decided before the enactment of Act 5149, deal with the exact situation here before the Court, and have been, and still are, cited with approval and as authority for the rule that where a charter or other statute requires the filing of a claim as a procedural step preliminary to the bringing of a suit for damages against the public body specified by the charter or statute in question, such preliminary procedural step is mandatory and failure to comply therewith, and to plead such compliance, is fatal to the cause of action.

Western Salt Company v. City of San Diego, supra. This was an action against the City of San Diego for damages arising from the collapse of the "lower Otay dam". The city charter of the City of San Diego, at that time provided (page 696 of the decision)—

> ". . . all claims for damages against the city must be presented to the common council and filed with the clerk within six months after the occurrence from which the damages arose, . . ."

In discussing this provision and the necessity for filing claims thereunder, the Court says on page 699:

> "There is no general law upon that subject, but the charter of each municipality prescribes the method for

such payment. The charter controls and, as the plaintiff has failed to present his claim for damages within the time provided by the charter, the demurrer was properly sustained."

Crescent Wharf Company v. City of Los Angeles, supra. Here the action arose from an alleged "taking for public use", *in violation of article I, section 14, of the California Constitution.* It was claimed that the wharf of plaintiff was totally destroyed, it having collapsed by reason of being undermined by the operations of the City of Los Angeles in dredging the San Pedro harbor basin. The charter of the City of Los Angeles, at that time, contained a provision (page 633 of the decision) that in the event of any claim for damages against the city, a written claim must be filed with the city within a period of six (6) months after the occurring of the damages.

It will be noted in reading the opinion in the *Crescent Wharf* case, *supra,* that the plaintiffs in that case, as do petitioners in the case now before the Court, contended that the acts of the City of Los Angeles amounted to a taking for public use without compensation first having been made as provided in article I, section 14 of the California Constitution.

The Court, in *Crescent Wharf Company v. City of Los Angeles, supra,* adopted the ruling made in *Western Salt Company v. City of San Diego, supra,* upholding the validity of charter provisions requiring the filing of claims for damages within a definite period, and held that the failure so to file would bar the right of action. These are leading cases on this point, cited in the California decisions wherever the point is involved.

The following cases, decided after the enactment of Act 5149, based upon the provisions of section 1 thereof, are to the same effect. In each of these cases, all of which were based upon Act 5149, it is specifically held that the provisions of the Act are mandatory and that section 1, relating to filing of claims within the period of ninety (90) days is a procedural prerequisite to the filing of a suit that must be at least substantially complied with, but particularly is it held that where there is a failure to file a claim within said period of ninety (90) days, the Court cannot acquire jurisdiction; that it is "fatal to the cause of action" or "that no cause of action accrues", or that such failure bars recovery against a city, county, etc.

Los Angeles Athletic Club v. Long Beach, 128 Cal. App. 427, 17 Pac. (2d) 1061 (1932);

Phillips v. County of Los Angeles, 140 Cal. App. 78, 35 Pac. (2d) 187 (1934);

Thompson v. County of Los Angeles, 140 Cal. App. 73, 35 Pac. (2d) 185 (1934);

Norton v. Pomona, 5 Cal. (2d) 54 at 56, 53 Pac. (2d) 952 (1935);

Myers v. Hopland Union Elementary School District, 6 Cal. App. (2d) 590, 44 Pac. (2d) 654 (1935);

Spencer v. Calipatria, 9 Cal. App. (2d) 267, 49 Pac. (2d) 320 (1935);

Johnson v. City of Glendale, 12 Cal. App. (2d) 389, 55 Pac. (2d) 580 (1936);

White-Satra v. City of Los Angeles, 14 Cal. App. (2d) 688, 58 Pac. (2d) 933 (1936);

Cooper v. Butte, 17 Cal. App. (2d) 43, 61 Pac. (2d) 516 (1936);

Strath v. Santa Rosa, 19 Cal. App. (2d) 382, 65 Pac. (2d) 894 (1937);

Yonker v. San Gabriel, supra;

Kahrs v. City of Los Angeles, supra;

Gapin v. City of Los Angeles, 34 Cal. App. (2d) 660, 94 Pac. (2d) 359 (1939).

If no cause of action accrues by reason of the failure to file, and to allege that such a claim was filed, within the time provided by section 1 of Act 5149, as stated in most of the decisions above cited, certainly the Court has no jurisdiction to hear or determine an action in which there is no cause, or in which the complaint is fatally defective upon its face.

D. THE REQUIREMENT THAT SUCH A CLAIM BE FILED MAY NOT BE WAIVED BY THE BOARD OF SUPERVISORS OF THE COUNTY, NOR DOES THE ALLEGED DISABILITY OF THE PETITIONERS EXTEND THE PERIOD.

It is more than evident from the cases decided by the Courts of California, that the provisions of section 1 of Act 5149 are mandatory and that not even physical disability or other disability shall operate to overcome the mandatory provisions of the section. It has been held that even the fact that the person injured is a minor, will not operate to lift the case out of the mandatory provisions of the section. One of the cases so holding is the case of *Myers v. Hopland Union Elementary School District, supra,* at page 591, where the Court says:

"The provisions of this section are mandatory and a person has no right to maintain such an action

unless he complies therewith. (*Thompson v. City of Los Angeles,* 140 Cal. App. 73 (35 Pac. (2d) 185.) (3) Plaintiff, although a minor, is bound by its provisions as there is nothing in the act excepting minors from its operation. (*Phillips v. City of Los Angeles,* 140 Cal. App. 78 (35 Pac. (2d) 187).)"

And it has been held that the fact that the person injured was physically unable to present her claim within the time allowed under section 1 of the Act will not relieve the claimant from the mandatory provisions of the section of said Act. (*Johnson v. City of Glendale, supra.*) In the *Johnson* case, above cited, the Court states that the question of whether disability is a valid excuse for the non-filing of a claim within the period provided in statutes of this kind making the filing of claims a prerequisite to the maintaining of an action for damages, is in confusion in various jurisdictions, but, the Court then says on page 394:

"The contrary, and we think the more satisfactory, rule is that the giving of notice or the filing of claims within the limited period allowed therefor is purely a matter for legislative control, and that where a law makes compliance mandatory and *no exceptions are provided in the law itself, the courts may provide none under the guise of interpretation or construction.* (*Haynes v. City of Seattle,* 83 Wash. 51 (145 Pac. 73); *People v. City of Valparaiso,* 178 Ind. 673 (100 N. E. 70); *Schmidt v. City of Fremont,* 70 Neb. 577 (97 N. W. 830); *Ellis v. City of Kearney,* 80 Neb. 51 (113 N. W. 803); *McCollum v. City of South Omaha,* 84 Neb. 413 (121 N. W. 438); *Touhey v. City of Decatur,* 175 Ind. 98 (93 N. E. 540, 32 L. R. A. (N. S.) 350); *Huntington v. City of Calais,* 105 Me. 144 (73 Atl. 829); *Daniels v. City of*

Racine, 98 Wis. 649 (74 N. W. 553); *Hay v. City of Baraboo,* 127 Wis. 1 (105 N. W. 654, 115 Am. St. Rep. 977, 3 L. R. A. (N. S.) 84); *Crocker v. City of Hartford,* 66 Conn. 387 (34 Atl. 98); *City of Ft. Worth v. Shero,* 16 Tex. Civ. App. 487 (41 S. W. 704); *Trost v. City of Casselton,* 8 N. D. 534 (79 N. W. 1071); *Gribben v. City of Franklin,* 175 Ind. 500 (94 N. E. 757); *Collins v. City of Spokane,* 64 Wash. 153 (116 Pac. 663, 35 L. R. A. (N. S. 840); *Benson v. City of Hoquiam,* 67 Wash. 90 (121 Pac. 58).)" (Italics added.)

It has even been held that where the plaintiff appeared personally before the Governing Board of the defendant municipality and was told by the officers of the municipality that her claim would be given due consideration and relying thereon, she failed to file her claim within the time prescribed by the act, no estoppel could be raised against the members of the Board to deny the non-filing of a claim under the act, nor did the statement of the Board that her claim would be considered, lift the case from the provisions of the act with reference to the filing of the claim. (*Johnson v. City of Glendale, supra,* at p. 395; *Phillips v. County of Los Angeles, supra,* at p. 80; and *Myers v. Hopland U. E. School District, supra,* at p. 592.)

The cases in California are very specific in holding that the officers of a municipality, county, school district or other district, coming within the provisions of Act 5149, may not themselves waive the provisions of the Act even though it might be their desire so to do. In support of this statement, respondent respectfully submits the fol-

lowing cases: *Johnson v. City of Glendale, supra; Yonker v. City of San Gabriel, supra; Spencer v. Calipatria, supra; Chapman v. City of Fullerton,* 90 Cal. App. 463; and *Western Salt Company v. City of San Diego, supra.*

Petitioners contend that they were under a disability which prevented them from filing their claim within the ninety (90) day period, to-wit, were unable to ascertain the extent of the damages until nearly nine months after the damage occurred. They contend, without citation of any authority in point, that this disability excused compliance with section 1 of Act 5149, and that, in effect, the period within which their claim should have been filed began to run from the time they first ascertained the full amount of the alleged damages. The California cases above cited are ample authority to the contrary, and the digests show that the rule accepted in California prevails in most of the other jurisdictions.

Petitioners, by inference, if not directly, argue that there is a difference between personal physical injuries and damages to real property. They admit that the provisions of Act 5149 apply to cases of personal physical injuries, and then attempt to distinguish injuries to real property.

We submit that it is the experience in personal injury cases that the actual extent of damage cannot be ascertained within ninety (90) days, most frequently not for a much longer period. The cases above cited are clear, however, that even if the plaintiff in such a personal injury case was actually physically disabled, and by reason thereof failed to file his claim within ninety (90) days

from sustaining the injury, his action would be barred.

Petitioners find themselves in no different position. Application of the rule established in California will work no greater injustice upon appellants than upon any other person claiming damage resulting from a dangerous or defective condition of public property or works.

E. From the Statement of Facts Contained in Petitioners' Complaint, Petitioners Have Not Pleaded and Are Now Unable to Plead or Prove the Filing of Such a Claim Within the Period Provided by Act 5149.

Upon a consideration of all of the foregoing, and after consideration of the allegation of petitioners' complaint [R. 1-9], noting that it is therein alleged that the damages complained of occurred on March 2nd, 1938 [R. 5], it not being alleged that any claim of any kind complying with the provisions of Act 5149 was filed with the Clerk of the Board of Supervisors of Ventura County within the period of ninety (90) days from the occurring of the damage, but only that a claim had been filed with the Auditor of the County of Ventura on December 28, 1938 [R. 7], nine (9) months and twenty-six (26) days after the damage occurred, it is quite evident that petitioners have wholly failed to bring themselves within the provisions of Act 5149 and that their complaint is "fatally defective". It being apparent upon the face of the complaint that they are now unable to amend the same to bring themselves within the provisions of Act 5149 under many of the cases above cited, they are not now entitled, under the law of California, to the further process of the Court in this matter. The demurrer was properly sustained without leave to amend.

F. Act 5149 Being Specific and Subsequent in Enactment Is Controlling Over Political Code Section 4075.

Counsel for petitioners contends that Act 5149 should have been construed with section 4075, Political Code (Petitioners' Brief 9, 10, 22).

The point is not a new one, having been raised and decided by the case of *Thompson v. County of Los Angeles, supra,* where it is stated on page 77:

> "Appellant's contention that the act is procedurally uncertain ignores the obvious necessity of construing and applying that act in connection with existing law as set out in Political Code, sections 4075 to 4078, inclusive. When this is done, the particular provisions of the act being paramount to the general provisions of the code (Code Civ. Proc., sec. 1859), there is neither uncertainty nor ambiguity."

This case then goes on to state that the provisions of Act 5149 are mandatory and not merely permissive.

That Act 5149 is controlling over sections 4075-78 of the Political Code is again reiterated in the case of *Cooper v. County of Butte, supra,* at page 45:

> "(1) In 1931 the legislature passed an act known as Act 5149, Deering's General Laws (Stats. 1931, p. 2475), relating specifically to the liability in damages of counties in cases of injuries to persons resulting from the dangerous condition of the highways and requiring the presentation of a verified claim therefor. Sections 4075-4078 of the Political

Code do not specifically relate to the filing of claims for damages arising out of personal injuries caused by defective highways, whereas Act 5149 does concern itself particularly with such matters. Therefore, the provisions of Act 5149 being specific and subsequent in enactment to section 4075 et seq. of the Political Code must govern rather than the general statutory requirements contained in the Political Code. This has been expressly held in the case of *Thompson v. County of Los Angeles,* 140 Cal. App. 73 (35 Pac. (2d) 185)."

The same point was decided in *Kahrs v. County of Los Angeles, supra,* wherein the Court stated on page 49 as follows:

"(2) Section 4075 of the Political Code, relied upon by appellants, is unavailing. The provisions of this section are general, and that the general must yield to the particular is a well-settled doctrine that requires no citation of authority. The trial court was correct in the conclusion that chapter 1167, Statutes of 1931, is controlling. (*Thompson v. County of Los Angeles et al.,* 140 Cal. App. 73, 77 (35 Pac. (2d) 185); *Douglass v. City of Los Angeles,* 5 Cal. (2d) 123 (53 Pac. (2d) 353); *Strath v. City of Santa Rosa,* 19 Cal. App. (2d) 382 (65 Pac. (2d) 894); *Cooper v. County of Butte,* 17 Cal. App. (2d) 43 (61 Pac. (2d) 516).)"

(Chapter 1167, Stats. 1931, referred to in this quotation is the same enactment as is herein designated "Act 5149.")

Petitioners, in their petition, on page 6, in referring to Act 5149 said—

> "No statute of limitations for such limited period, concerning damages to real property, has ever before been enacted in this State, or any other State, so far as petitioners' very extensive examination discloses."

After a brief examination of the cases, we find a similar situation in the case of *Dayton v. City of Asheville,* 185 N. C. 12, 115 S. E. 827, the statement of facts show that the City of Asheville had erected an incinerator (at page 828)

> ". . . for the purpose of destroying and burning city garbage, refuse, etc., on an adjacent lot or one in close proximity to plaintiffs' property . . . and that, by reason of its erection, location, and continuous operation . . . the said houses and lots, . . . , have been, . . . enveloped in smoke arising therefrom, which said smoke, together with grease and ashes, constantly settles upon, damages, and injures plaintiffs' houses and lots and every particle of household furniture and other articles located in said houses or on said lots."

The statement of facts went on to show that the atmosphere was polluted and that plaintiffs' lots could not be used for the customary cultivation and gardening. It was contended that such act was a taking of the property.

The statute of limitations in that instance was three (3) years, but the city charter provided that a *claim must*

be filed within ninety (90) days after the date of the first substantial injury to their property, with the Board of Aldermen of the City of Asheville. The Court, in referring to such requirements states as follows at page 829:

> "(4) The plaintiffs, under the provisions of the city charter, were required to show that their claim for compensation had been filed with the board of aldermen of the defendant city within ninety days after the first substantial injury to their property, which is alleged to have been caused by the maintenance and operation of said incinerator. Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738. It has been held with us, in a number of cases, that, as a prerequisite to a suit of this kind, in the absence of a valid excuse (Hartsell v. Asheville, 166 N. C. 633, 82 S. E. 946), it is necessary both to allege and to prove that a demand was made upon the municipal authorities before commencing action; such requirement being incorporated in the city charter. Hartsell v. Asheville, 164 N. C. 195, 80 S. E. 226; Pender v. Salisbury, 160 N. C. 365, 76 S. E. 228; Terrell v. Washington, 158 N. C. 281, 73 S. E. 888."

Respondent does not have access to the statutes of the various states, but feels sure that a further examination of such statutes would disclose similar statutes in the various states of the Union. In the case of *Winters v. City of Niagara Falls, supra,* the statute there provided for a thirty-day notice (see quotation on p. 45 of this brief).

II.

Act 5149 Does Not Violate Either the Thirteenth or Fourteenth Sections of Article I of the Constitution of California or the Fifth or Fourteenth Amendments of the Constitution of the United States.

A. Act 5149 Does Not Violate Section 14 of Article I of the Constitution of California.

Petitioners, in their complaint, have pleaded [R. 7, 9] that section 1 of Act 5149 violates section 14 of article I of the California Constitution which section provides that

> "Private property shall not be taken or damaged for public use without just compensation having first been made, . . ."

[Section 14 of article I of the Constitution of California set out in full in Appendix page 6.]

This identical question, under a similar state of facts has been raised in several cases heretofore presented to the Courts of Appeal in California, and in each case Act 5149, or similar statutes, have been declared not to violate this constitutional section. The leading cases in this connection, involving very similar states of facts as in the instant case, decided before the enactment of Act 5149, are the leading cases of *Crescent Wharf Company v. County of Los Angeles, supra,* and *Western Salt Company v. City of San Diego, supra.*

The case of *Yonker v. City of San Gabriel, supra,* being so similar in its facts that it may be called identical with the instant case, passing upon the provisions of Act 5149, *directly held that Act 5149 applied to this type of case, and that it did not violate the provisions of section 14 of article I of the California Constitution.*

In petitioners' brief (p. 18 and following), petitioners cite several cases purporting to hold that the facts of the instant case constitute a "taking or damaging" for public use. It is submitted however, that in none of the cases cited are the facts at all similar. The cases of *Pumpelly v. Green Bay & M. Canal Co.,* 13 Wall. 166, 20 L. Ed. 557-662; and *Hopkins v. Clemson Agric. College,* 221 U. S. pp. 636-649, 55 L. Ed. pp. 890-897, stressed by petitioners, while arising from injury to property by canals or river work, are distinguishable. In those cases the public work was of a permanent nature, built to handle or control water channels continually carrying waters and causing an underground seepage of a continuous nature. The other cases dealt with damages resulting from river work or the impounding of waters by building of dams where the inundation or seepage would be a permanent taking. There the injury would persist for a long and indefinite period of time, perhaps forever. How different the facts in the instant case. It is uncontradictable, and indeed, the Court may take judicial notice of the fact, that the streams or creeks of Southern California are almost entirely "flash" streams. That during almost all of the year these streams have little, and usually, no water in them, but during the actual period of rain, and for a very few days thereafter, they carry varying quantities of water. During a rain storm they very quickly build up to a "flash" peak, and as rapidly cease to flow, returning to dry or almost dry sandy channels. The question of seepage and infiltration such as entered into the facts of the *Pumpelly, Hopkins* and other cases cited by petitioners make those cases entirely different from the situation existing in California, and particularly in the instant case. In those cases the damages complained of

were of a permanent nature, but here, the damages were temporary in nature. No prior inundations of petitioners' lands were pleaded, and perhaps none may ever again occur in the future. The complaint pleads that the silts deposited have been removed and the irrigation lines replaced. The trees alleged to have been destroyed, if any were completely destroyed, are not a "permanent" loss, for new trees will grow, the land having again been returned to its former agricultural status.

It will also be noted that the *Pumpelly, Hopkins* and other cases, *supra,* cited by petitioners deal with whether the plaintiffs had a right to sue. Respondent does not deny this right but contends that Act 5149 provides a procedure precedent that must be followed, to-wit, the filing of petitioners' claim within ninety (90) days after March 2nd, 1938. *Crescent Wharf Company v. County of Los Angeles, supra,* and *Winters v. City of Niagara Falls, supra.*

We think the case of *Yonker v. San Gabriel, supra,* exactly covers the situation in this case. In discussing the application of article I, section 14 of the California Constitution, the Court, in that decision, on page 558, says:

> "The section of the Constitution referred to provides that private property shall not be taken or damaged for public use without just compensation being made therefor. At the time of the dumping of the material herein referred to by the agents of the City of San Gabriel upon the abutments of the Ramona Street bridge no property of the plaintiff was either taken or damaged. *The damage, if any, was as the*

authorities claim, consequential, but whether it correctly be denominated consequential or direct, immdiate, the record shows no damage resulted from the mere fact of dumping the refuse material upon the abutments referred to, but that subsequently torrential rains occurred, causing an excessive flow in the wash referred to, the waters thereof carrying down the refuse matter upon the property belonging to the plaintiff." (Italics added.)

No damage resulted, nor was any property taken or damaged by the mere construction of, and subsequent extensions to, the drainage ditch here involved, at any time during the twenty-two (22) years prior to March 2nd, 1938, nor are any pleaded in the complaint, but on March 2nd, "torrential rains" occurred, causing an "excessive flow in the wash referred to", resulting in the overflowing of the ditch and the carrying down of debris and refuse material upon the property of petitioners, and damage is alleged to have resulted therefrom.

It is respectfully submitted that the acts complained of did not constitute a "taking or damaging for public use" within the meaning of article I of section 14 of the California Constitution, and the rule established by the cases of *Western Salt Company v. San Diego, supra; Crescent Wharf Company v. City of Los Angeles, supra,* and *Yonker v. San Gabriel, supra,* is controlling in the case here before the Court.

But, assuming that the acts here complained of did amount to the "taking or damaging of private property for public use" as prohibited by article I of section 14, it is the rule in California that where the Constitution declares a right, but does not provide the procedure by which that right may be pursued, the Legislature may

enact reasonable procedural rules for the enforcement of the right. This rule is set out in *Crescent Wharf Company v. County of Los Angeles, supra,* at page 436, where it is said:

> "When a state constitution such as ours provides neither the mode for the taking nor for the payment of private property the mode of procedure may be provided by either statutory or charter provisions. The following quotation taken from 16 Cal. Jur. 396, 397, is supported by the decisions of this state:
>
> " 'The power to impose reasonable periods of limitation is unquestioned, for a statement of a right in a constitution is always subject to reasonable statutory limitations of the time in which such right may be enforced, unless the constitution itself declares otherwise. The legislature may prescribe the different periods of time within which different species of obligations may be enforced and may prescribe that as to some obligations there shall be no limitation of time . . .'"

The opinion, at page 437, then cites the following from the case of *Bancroft v. City of San Diego,* 120 Cal. 432, 52 Pac. 712:

> "The *policy* of a charter adopting a six months' period in which claims for damages to property, which is in a sense a taking of the property, is held to be beyond question."

See, also:

> *City of Los Angeles v. Oliver,* 102 Cal. App. 299, 283 Pac. 298.

A few of the many other cases supporting the rule that charter provisions relating to the filing of claims must be complied with, are:

Bigelow v. City of Los Angeles, 141 Cal. 503, 75 Pac. 111;

Spencer v. City of Los Angeles, 180 Cal. 103, 179 Pac. 163;

Metropolitan Life Insurance Co. v. Rolph, 184 Cal. 557, 194 Pac. 1005;

Alden v. Alameda County, 43 Cal. 270;

Rhoda v. Alameda County, 52 Cal. 350;

McCann v. Sierra County, 7 Cal. 121.

The Court's attention is particularly directed to the case of *McCann v. Sierra County, supra,* last above cited, for the reason that as early as 1857, when that case was decided, the courts have held that even though the act complained of be a taking in violation of a right declared by the constitution, a statute providing the means of pursuing that right must be pleaded or the cause of action does not accrue.

In the *McCann* case, *supra,* the County of Sierra extended a road across the lands of plaintiff without condemnation proceedings and without any provision for compensating McCann, who filed a complaint in two counts. The first count was for a restraining order, the second for damages for the taking. Under the County Government Act then in force, it was provided (p. 124) that

". . . 'no person shall sue a county *in any case,* for any demand, unless he or she shall first present

his or her claim to the board of supervisors for allowance, and the same shall be rejected in whole or part.'" (Italics added.)

At that time, the Constitution of California, relating to the "taking" of land for public use provided (p. 123):

". . . 'that private property shall not be taken for public use, unless just compensation be made therefor.'"

In the *McCann* case, *supra,* it will be noted, the taking *was deliberate, not accidentally caused by torrential rains,* but the Court nevertheless ruled that the general law was applicable, and sustained the demurrer, the complaint not alleging the filing of a demand as required by the statute.

B. Act 5149 Does Not Violate the Provisions of Section 13, Article I of the Constitution of California.

The complaint in this case does not plead a violation of section 13, article I of the Constitution of California. The question, however, was argued by petitioners in the Court below. Inasmuch as section 13, article I raises the same question as is raised by the Fourteenth Amendment to the Federal Constitution, Due Process, section 13, article I, will be later included in discussion of the Fourteenth Amendment.

[Section 13, article I, Constitution of California is set forth in full in Appendix page 6.]

C. THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES DOES NOT APPLY TO THE VARIOUS STATES, BUT IS A LIMITATION UPON THE FEDERAL GOVERNMENT ONLY, AND HENCE IS NOT HERE APPLICABLE.

In their complaint, petitioners have contended that the provisions of section 1 of Act 5149, and the acts of respondent, violate the provisions of the Fifth Amendment to the United States Constitution [R. 8]. It is respectfully urged that the Fifth Amendment to the Constitution has no bearing on this particular case. The Fifth Amendment, in so far as it might be here applicable reads—

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

It has long been accepted by the courts of the United States that the *Fifth Amendment acts only as a limitation upon the Federal Government,* prohibiting it from abridging any of the rights therein declared. It has no application to laws enacted by the various states. (*Nebbia v. New York,* 291 U. S. 502 at 528 (78 L. Ed. 940 at 950), 12 Cor. Jur. 959, page 1194 and approximately fifty cases cited there, Cor. Jur. Sec., Vol. 16, p. 1146, Sec. 568-b and many cases there cited.) It is respectfully submitted that application of the Fifth Amendment is not here under consideration.

D. THE CONTENTION THAT ACT 5149 IS VOID AS AGAINST PUBLIC POLICY AND DUE PROCESS IN THAT IT PERMITS AN ALLEGED DELEGATION OF AUTHORITY TO APPROVE OR REJECT CLAIMS TO INSURANCE CARRIERS.

Petitioners contend that Act 5149 is unconstitutional by reason of the fact that it contains a provision permitting the public bodies embraced within its scope to insure against injuries or damages resulting from the dangerous or defective condition of public buildings, parks, grounds, works or property, either by self-insurance or in any authorized insurance company (section 3). Their contention is apparently based upon the premise that boards of supervisors are *deprived* of the power to pass upon and determine whether claims should be granted or rejected. The statute makes no such delegation, and the weakness of the contention is apparent. The act specifically *requires* the board to pass on such claims.

Whatever the case may be in respect to other counties, respondent is unable to conceive in what manner petitioners are injured in the current case inasmuch as their belated claim was presented to the Board of Supervisors of the respondent county, and was passed upon and denied by said county, (without the assistance or intervention of insurance company attorneys), the petitioners having failed to file the same within the time provided by Act 5149. Under the provisions of Act 5149 and the many cases cited by respondent, the Board was without authority to waive the provisions of the act and to grant the claim (*Myers v. Hopland, etc. School District, supra; Johnson v. City of Glendale, supra; Yonker v. San Gabriel, supra; Spencer v. Calipatria, supra; Chapman v. City of Fullerton, supra; Western Salt Company v. City of San Diego,*

supra; Cooper v. County of Butte, supra), and any payment to the petitioners, had the Board determined that petitioners were entitled to compensation, would have been an illegal expenditure of public money.

Incidentally, the Court will note from the record herein that (unfortunately) no brilliant insurance specialist appears for the respondent county, counsel herein being "run of the mill" members of the District Attorney's staff. The county is not indemnified by any policy of liability insurance covering the situation embraced by this cause.

Assuming, however, that it had been so insured, petitioners would be in no different situation than if they had been representing a petitioner suing the county under a workman's compensation policy, fire insurance policy, or accident policy indemnifying them against personal injuries and property damage as a result of fallen buildings, automobile injuries or any other types of indemnity.

The District Court of Appeal in its decision in this case adequately disposes of petitioners' contention in this respect. If Act 5149 is indeed unconstitutional as being against public policy and violating due process because the county might have insured itself, then every statute which provides for and permits the carrying of insurance by schools, counties and other public agencies is void and the statutes of the State must indeed be in a very muddled condition.

As a matter of fact, it can readily be seen that the insuring by a county or other public agency might be of great protection to petitioners. It is not inconceivable that in some of the smaller counties, a judgment, if allowed in the amount prayed for in this cause, would find those small counties without funds with which to pay

such a judgment and the successful litigant in such a case would have to wait for some period of time until assessment was made and collected from the taxpayers for the purpose of paying the judgment. But where such insurance was available the compensation or damages would be forthcoming in a relatively brief time after final judgment. It is respectfully contended that petitioners' contention and argument in this respect are entirely unsound.

E. Act 5149 Does Not Violate Any Provision of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

We submit that unless Act 5149 does indeed violate due process as prohibited by section 13, article I of the Constitution of California, or section 1 of the Fourteenth Amendment to the Federal Constitution, petitioners' prayer for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division Two, must be denied.

Petitioners, in their brief (page 19) claim that Act 5149 violates the due process provisions of the Constitution of the United States, although no California cases are cited in this regard.

In the case of *Crescent Wharf Company v. City of Los Angeles, supra,* decided before the amendment of Act 5149, a city charter required the filing of a claim. As stated in the decision, there was no general law relating to suits for damages against municipalities and the Court says at page 437:

> " 'It is, however, claimed that this provision of the charter is invalid for the reason that the freeholders' charter conflicts with the general law, and is only

> supreme in 'municipal affairs.' . . . This contention is predicated upon the proposition that by the general law a complaint for damages is a sufficient presentation of a demand against an individual or private corporation. The question involved here, however, is an entirely different one namely, the method of securing payment of claims against a municipality, an agency of the state. There is no general law upon that subject, but the charter of each municipality prescribes the method for such payment. The charter controls, and, as plaintiff has failed to present his claim for damages within the time provided by the charter, the demurrer was properly sustained.' "

Several earlier cases in effect make the same statement and, as in the *Crescent Wharf* case, *supra,* hold that the filing of a claim under a *charter provision* so requiring is a condition precedent to maintaining an action against a municipality. In 1931, Act 5149 was enacted and since then there has been a "general law" relating to suits against counties, cities, school districts, etc., affecting equally all persons coming within its scope.

Section 13, article I, California Constitution reads, so far as is here applicable—

> "Sec. 13. . . . No person shall be . . . deprived of life, liberty, or property without due process of law."

Section 1, of the Fourteenth Amendment, United States Constitution reads, so far as here applicable—

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

That section 1 of Act 5149 does not violate the "equal privilege and immunities" or the "equal protection" clauses of the section above cited, is evident. Act 5149 does not apply to citizens of any individual state in preference to the citizens of any other state, nor to any group of persons claiming against a county to the detriment or distinguishment of any other group of parties suing a county. The section applies equally to any and all persons, regardless of their status or the state of their residence, *"whenever* it is claimed that *any"* such *"person* has been *injured* or *any property damaged"* as the result of acts or things stated in section 1 of the Act.

This leaves us a consideration of whether or not the Act violates the "Due Process Clause" of section 1 of the Fourteenth Amendment of the Constitution of the United States. In only one of the cases cited by petitioners, has it been held, or even inferred, that a ninety-day limitation is not a reasonable limitation, and the one case cited by them, is a case based on a Statute of the State of Colorado. That case states that a ninety-day limitation is unreasonable and violative of the Due Process clause. But the Colorado statute referred to in the case cited by petitioners (*Lamb v. Powder River Live Stock Co.* (8th Cir.), 132 Fed. 434-444) is in no way analogous to the case here before the Court.

The opinion in the *Lamb* case, in passing upon the Colorado statute there under consideration, discussed at length the unfairness of that statute in fixing a ninety-

day statute of limitation applicable to non-residents as distinguished from residents of Colorado. The Colorado statute was discriminatory, and the Court held that inasmuch as there was no reasonable basis for the discrimination, the statute violated Due Process.

As heretofore pointed out, no such objection may be made to Act 5149. It applies equally to every person in this and every other state,

> "*Whenever* it is claimed that *any person* has been injured or *any property* damaged as a result of the dangerous or defective condition of any public . . . grounds, works or property, . . ." (Italics added).

There is, of course, this further distinction in the *Lamb* case, *supra,* and the case now before the Court. In the *Lamb* case, there were no procedural steps to be taken—no notice or claim to be filed. In the instant case, the Statute of Limitations has never started to run, for, as the cases state, inasmuch as petitioners did not comply with the procedural "condition precedent" the cause of action against which a Statute of Limitations could run, never accrued. Had that procedural step been taken by petitioners, the Statute of Limitations would not have expired for at least nine (9) and perhaps twelve (12) months from March 2nd, 1938, for the reasons pointed out on pages 47 and 48 of this brief.

It is difficult to think that the courts of California having had presented to them some fifteen (15) cases coming directly within the provisions of section 1 of Act 5149, and numerous cases prior to the enactment of Act 5149, involving periods of limitation, or, more properly, periods within which certain procedural steps must be complied with before a cause of action will accrue, and having consistently sustained the provisions of the char-

ters so providing, and the provisions of Act 5149, that such courts would have overlooked such an important phase of the law as due process, for it is to be inferred that such courts will render justice even though counsel presenting the various causes referred to may have overlooked the particular point raised by petitioners in this case.

It has been stated in Vol. 12 Corpus Juris, p. 1188, Sec. 956 and Vol. 16 C. J. S., page 1140, Sec. 567, that "due process" has no universally accepted definition.

We feel that the subject of due process, as applied to a "taking" of land and statutes relating thereto, as well as the intent and application thereof, is well discussed in the California case, *City of Los Angeles v. Oliver, supra.* The discussion of Due Process in that case is lengthy, but thorough, and for the sake of brevity, reference is made thereto, without quotation. The Court will note, however, that the case was one of eminent domain, involving an *intentional* taking (as distinguished from an *unintentional* damaging) of property. The case quotes extensively from Federal cases, and we submit, disposes of every constitutional contention made by petitioners.

It is difficult to conceive in what manner petitioners have been deprived of due process. Act 5149 provides a procedural step only. In strict effect, it is not a Statute of Limitations at all, as was stated in the case of *Winters v. City of Niagara, supra.*

This case, dealing with a charter provision requiring the filing of a claim within *thirty days* after injury or damage, is cited with approval by the very latest case in California relating to Act 5149 (*Gapin v. City of Los Angeles, supra,* decided in September, 1939).

The following quotation is from the case of *Winters v. City of Niagara Falls, supra,* at page 1102:

> "Very correctly, the opinion of the court below disposed of the plaintiff's contention that the provision of the charter with respect to the time for presentation of a claim was a statute of limitation, the running of which, within the provisions of Code Civ. Proc. Sec. 396, would be suspended during infancy. *It was nothing of the kind, for, as it was observed, the requirement does not relate to the commencement of an action. The statute requires the presentation of a claim to be made within 30 days of the occurrence causing the damage, and it bars an action against the city in the case of an omission to do so.* The provision therefore became an essential part of a complainant's cause of action, and compliance with its requirement was a fact to be alleged and proved, like any other condition precedent to the existence of an obligation . . . *To require the presentation of a claim within a specified time is quite a reasonable provision,* inasmuch as thereby the municipality is afforded a measure of protection against stale claims, or the possible connivance of corrupt officials. *It permitted an investigation into the occurrence to be had at a time when the evidence relating to it might more readily be collected.*" (Italics added.)

It will be noted that in this case, the period within which a claim must be filed in the event of injuries under a provision of a city charter almost identical with those of Act 5149, is *thirty days.* In this case, it was held that the thirty-day provision was reasonable and failure of the claimant, a minor, to file a claim within that period, and to allege in his complaint that such filing has been made, was fatal to his cause of action.

Petitioners contend in their brief that because they allege they were unable to ascertain the true amount of the damages within the period of ninety (90) days, that Act 5149 does not apply, that Act 5149 is unreasonable, and in effect, that they should be accorded a period of time after they have ascertained the damages in which to file their claim, and that because the act does not so provide, they have been denied due process of law.

Cases heretofore cited in connection with other points in this brief, relating to disabilities such as minority, physical disabilities and the like (*Yonker v. San Gabriel, supra, Phillips v. Los Angeles, supra, Winters v. Niagara, supra*) definitely overrule this contention and it is particularly called to the attention of the Court that had petitioners, within the ninety (90) day period provided by Act 5149, filed a claim for damages, setting forth, (even if grossly exaggerated), their alleged damages as they were then able to ascertain them, they would now be legally before the Court. This contention was recognized by the decision of the Court which petitioners here seek to review [R. 36].

> *"Plaintiffs were not called upon to file more than a general statement of their claim, which could doubtless be prepared within a period of ninety days.* If their claim could not be settled by negotiation with the authorities of defendant county, accurate and complete proof of the extent of the damages could be prepared for an action in court. In this regard they are in no different position from that of most of the claimants for damages for personal injuries, who as a general rule cannot determine the exact amounts of their damages within ninety days from the dates of the accidents. *Plaintiffs cannot successfully argue that by the statutory requirement*

of filing a claim they were deprived of due process of law. The legislature has furnished due process to them but they did not avail themselves of it." (Italics added.)

The amount of damages would have been a matter of proof to be decided in Court. They would then have complied with the "procedural step" referred to by many of the preceding cases, and the Board of Supervisors and the respondent County would have been in a position to have ascertained the extent of the damages and to have entered into negotiations with petitioners. If their claim had been just, the Board of Supervisors would have then been legally authorized under the Act to negotiate and to make a just settlement of the damages, if any in fact existed. In the event that the claim was unfounded or the Board of Supervisors of respondent County, after investigation, were unable to admit liability, and the claim had then been denied, or the claim had been held by the Board of Supervisors for a period of ninety (90) days, unacted upon, the same would have been denied by lapse of time (Political Code, Section 4078), [set forth in full in Appendix p. 5]. The petitioners would then have had six (6) months within which to file their complaint (Sec. 342 C. C. P. and Sec. 4078 Pol. Code), [Sec. 342 C. C. P. set forth in full in Appendix p. 5]. Not until the rejection by the Board, or the lapse of ninety (90) days inactivity by the Board, would the "Statute of Limitations" within which actions must be filed in this particular type of case, have started to run, and the time within which peti-

tioners would have been barred by the Statute of Limitations, beginning on March 2nd, 1938, would have extended for a minimum period of more than nine (9) months. As it is, petitioners have really failed to avail themselves of, and have actually waived, the due and orderly process of law established to protect both the public at large and the instrumentalities of the State, in this case, a county.

It is hard to see where the petitioners have in any way been deprived of due process. *The "process" was there, petitioners merely neglected to avail themselves of it.*

It has been said that legislation must have a

> ". . . reasonable relation to a proper legislative purpose." (16 C. J. S. page 1157, Sec. 569.)

But short reflection will indicate that Act 5149 very definitely has a "reasonable relation to a proper legislative purpose", that purpose being to obviate the situation in which the respondent County finds itself by reason of the failure of petitioners to file a claim within the ninety (90) day period provided by Act 5149.

It must be borne in mind, assuming the original acts of the county were indeed a taking, as contended by petitioners, that *such taking was not intentional,* nor was the flooding of petitioners' land done with the knowledge of respondent. Act 5149 provides that the Board of Supervisors may, after the filing of the claim within the time allowed thereby, with the consent of the District Attorney, compromise such a claim. Respondent was deprived of this right by petitioners' failure to so file its claim.

Conclusion.

Act 5149 is constitutional, it reasonably relates to a proper legislative purpose—the purpose of preventing public bodies from being harassed and embarrassed in their public functions by unreasonable delays and by the destruction or removal of all the evidence necessary, either for the purpose of determining reasonable compensation, or in defending suits for damages, whether those damages be based on injuries to person or property. *Neither the purposes, nor the act, is arbitrary, capricious, discriminatory or unreasonable.*

Had the legislature intended that disability such as that claimed here by petitioners should act to relieve them of the requirements of section 1 of Act 5149, the legislature would have included such an exception in the act itself at the time of its enactment. As was stated by the Court in *Johnson v. City of Glendale, supra,* at page 395, in discussing this very section:

> ". . . It states no exceptions and we are unable to believe that any were intended. If there were to be exceptions they should have been stated in the act itself. It is not for the courts to create them. It must be presumed that the legislature would have made disability an excuse for failure to present a claim had it been intended to grant that privilege. There is nothing novel in this class of legislation. Wherever liability of municipalities for negligence is recognized, general laws, charter provisions or ordinances will be found imposing conditions upon the assertion of claims for damages, and many such are

discussed in the books which are far more rigorous than our own statute. Without excusing the presentation of claims during possible periods of disability, the 1931 statute allows ninety days in which to make claim, and this must be conceded to be a *liberal period when the purposes of the law are considered*, one of such purposes, *and a very important one, being to afford the municipality an opportunity to investigate the cause of the accident and the extent of the injury or damage.*" (Italics added.)

Respondent respectfully reiterates the contention that petitioners' petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, should be denied.

M. ARTHUR WAITE,
District Attorney of Ventura County;

JULIEN G. HATHAWAY,
Deputy District Attorney of Ventura County;

H. F. ORR,
Attorneys for Respondent County of Ventura.

APPENDIX.

ACT 5149 DEERING'S GENERAL LAWS (Stats. 1931)

Act 5149. Liability for Personal Injuries or Property Damages Resulting from the Defective or Dangerous Condition of Public Streets, etc. (Stats. 1931, p. 2475.)

An act relating to the liability in damages of municipalities, counties, cities and counties, and school districts, in the case of injuries to persons or property resulting from the defective or dangerous condition of public streets, highways, bridges, buildings, works or property; prescribing the duties of the officers thereof in such cases, and authorizing such public or quasi-public corporations to take out and pay for insurance to protect them against such liability.

Sec. 1. *Claim for damages suffered on public property.** Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works, or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received.

---

*(Titles to sections are Editor's notes and not part of Act. *Kahrs v. City of Los Angeles,* 28 Cal. App. (2d) 46; 82 Pac. (2d) 29.)

Sec. 2. *Duty of attorney for municipality, etc.** Whenever any suit for damages is brought against any municipality, county, city and county, or school district on account of injuries to persons or property, alleged to have been received as a result of the dangerous or defective condition, of any public streets, highway, building, park, grounds, works or property, it shall be the duty of the attorney for such municipality, county, city and county, or school district, as the case may be, to act as counsel in defense of such suit, unless lawful provision has been made for the employment of other counsel in connection therewith; and the fees and expenses involved therein shall be a lawful charge against such municipality, county, city and county, or school district, as the case may be.

Sec. 3. *Municipalities, etc., may insure.** Municipalities, counties, cities and counties, or school districts, may insure against any liability, other than a liability which may be insured against under the provisions of the workmen's compensation insurance and safety act, or under the workmen's compensation insurance and safety act of 1917, for injuries or damages resulting from the dangerous or defective condition of public streets, highways, buildings, parks, grounds, works and property, either by self-insurance, or in any insurance company authorized to transact the business of such insurance in the state of California; and the premium for such insurance shall be a proper charge against the public treasury of such municipality, county, city and county, or school district, as the case may be.

---

*(Titles to sections are Editor's notes and not part of Act. *Kahrs v. City of Los Angeles,* 28 Cal. App. (2d) 46; 82 Pac. (2d) 29.)

Sec. 4. *Payment or compromise of claims.** In any case where legal liability is admitted or disputed the municipality, county, city and county, or school district may pay any bona fide claim or compromise any such disputed claim out of public funds, provided that in any such compromise the district attorney, city attorney, county counsel, or attorney having charge of such matters approves the terms of such compromise.

Sec. 5. *Definitions.* Wherever the words "person" or "public" are used in this act, such words shall be deemed to include any pupil attending the public schools of any school or high school district.

DEERING'S POLITICAL CODE OF CALIFORNIA, *Section 4075.*

Sec. 4075. *Itemization of claims: Unitemized claim not to be considered: Notice to itemize and reverify claim: Presentation of claims: No suit before claim presented and rejected: Details of claim not founded upon contract.* The board of supervisors must not hear or consider any claim in favor of any public officer, person, corporation, company, or association against the county, nor shall the board credit or allow any claim or bill against the county or district fund, unless the same be itemized, giving names, dates and particular service rendered, character of process served, upon whom, distance traveled, where and when character of work done, number of days engaged, supplies or materials furnished, to whom, and quantity and price paid therefor, duly verified to be correct, and that the amount claimed is justly due, and is

---

*(Titles to sections are Editor's notes and not part of Act. *Kahrs v. City of Los Angeles,* 28 Cal. App. (2d) 46; 82 Pac. (2d) 29.)

presented and filed with the clerk of the board, or with the auditor, according to the procedure prescribed for the particular county, within a year after the last item of the account or claim accrued. If, in case of any claim which requires itemizing, the board do not hear or consider the same because it is not itemized, they shall cause notice to be given to the claimant or his attorney of that fact and give time to have the claim itemized and reverified; provided that the verification of claims may be dispensed with as provided in section 4076 of this code.

Presentation of claims. All claims against any county or against any public officer in his official capacity payable out of any public fund under the control of the board of supervisors, whether such claim be founded upon contract, express or implied, or upon any act of omission of the county or any officer or employee thereof, or of any district or public entity the funds of which are controlled by the board of supervisors, or of any officer or employees of any such district or public entity, shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim, and no suit shall be brought on any such claim until said claim has been presented as herein provided, and rejected in whole or in part. In presenting any claim not founded upon contract full details as to the nature of the claim, the time and place when and where it arose, the public property and public officers or employees alleged to be at fault, the nature, extent and amount of the injury or damage claimed, and all other details necessary to a full consideration of the merit and legality of such claim shall be stated in writing signed by the claimant or someone authorized by him, and in all other respects such claims shall be presented and acted upon in the same manner as claims

founded upon contracts. (Added by Stats. 1907, p. 379; Amended by Stats. 1913, p. 835; Stats. 1915, p. 1185; Stats. 1931, p. 197.)

DEERING'S POLITICAL CODE OF CALIFORNIA, *Section 4078.*

Sec. 4078. *Failure to allow or reject claim for ninety days equivalent to rejection: Suit on rejected or partially allowed claim; Limitation of action; Judgment, allowance and payment of claim on presentation of copy.* If the board refuse or neglect to allow or reject a claim or demand for ninety days after the same has been filed with the clerk, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a final action and rejection on the ninetieth day, and a claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board, but not afterward, and if, in such action, judgment is recovered for more than the board allowed, on presentation of a certified copy of the judgment, the board must allow and pay the same, together with the costs adjudged; but if no more is recovered than the board allowed, the board must pay the claimant no more than was originally allowed. (Added by Stats. 1907, p. 381.)

DEERING'S CODE OF CIVIL PROCEDURE OF CALIFORNIA

Sec. 342. Within six months: Actions on claims against county. Actions on claims against a county, which have been rejected by the board of supervisors, must be commenced within six months after the first rejection thereof by such board. (Enacted 1872.)

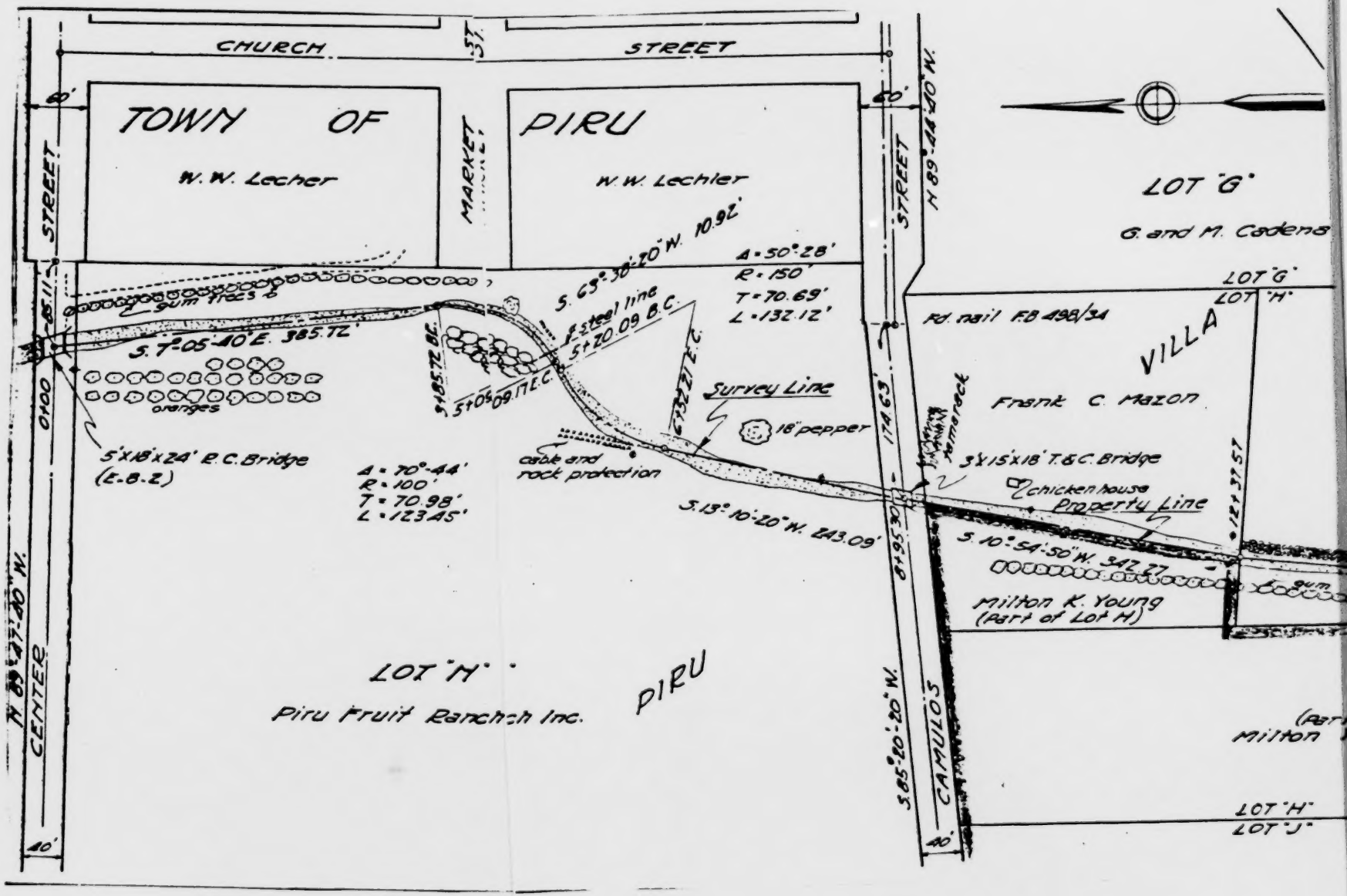
TREADWELL'S CONSTITUTION OF CALIFORNIA
ARTICLE I

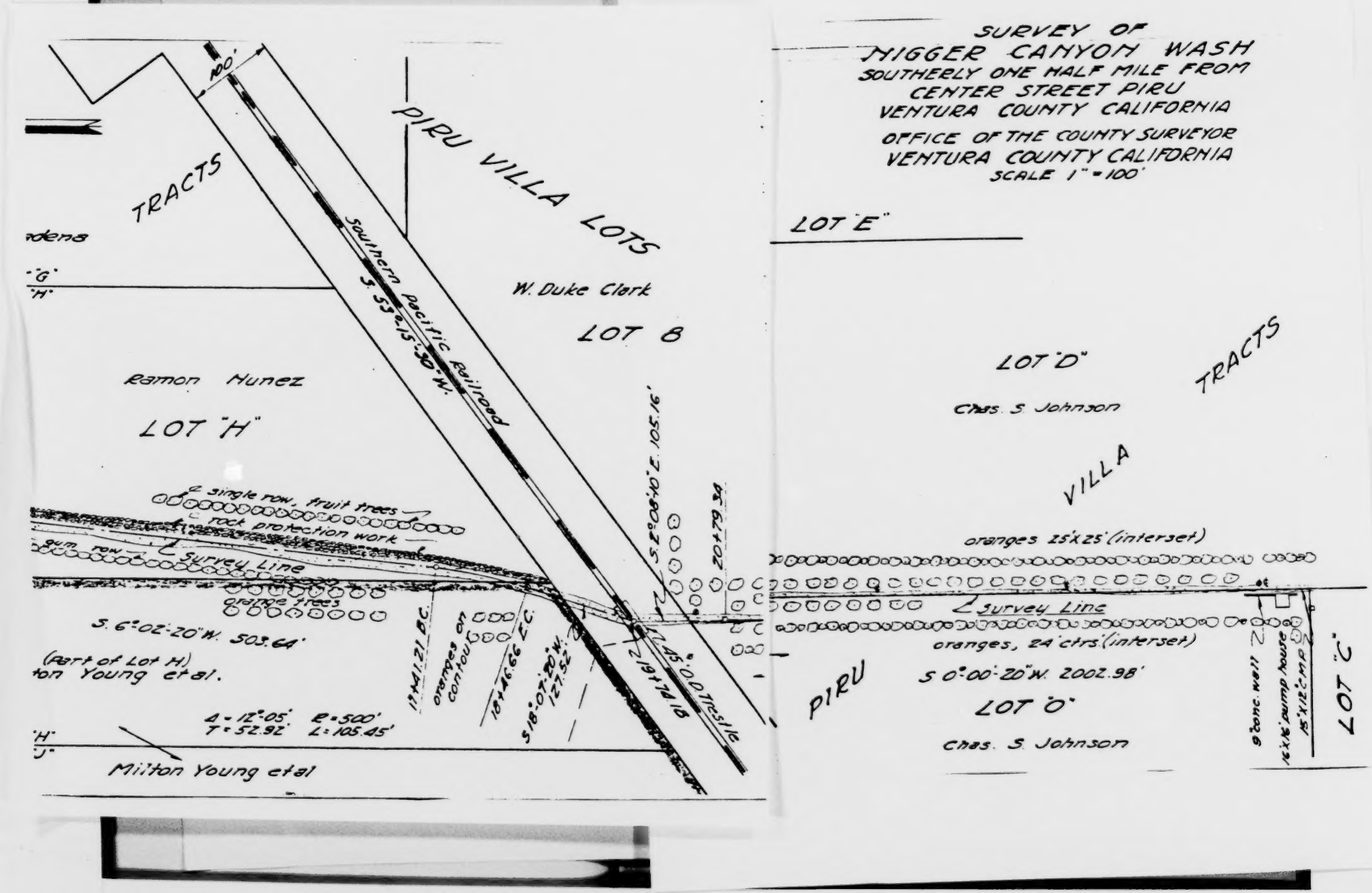
Sec. 13. Personal and property rights. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law. The legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses, in criminal cases other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial.

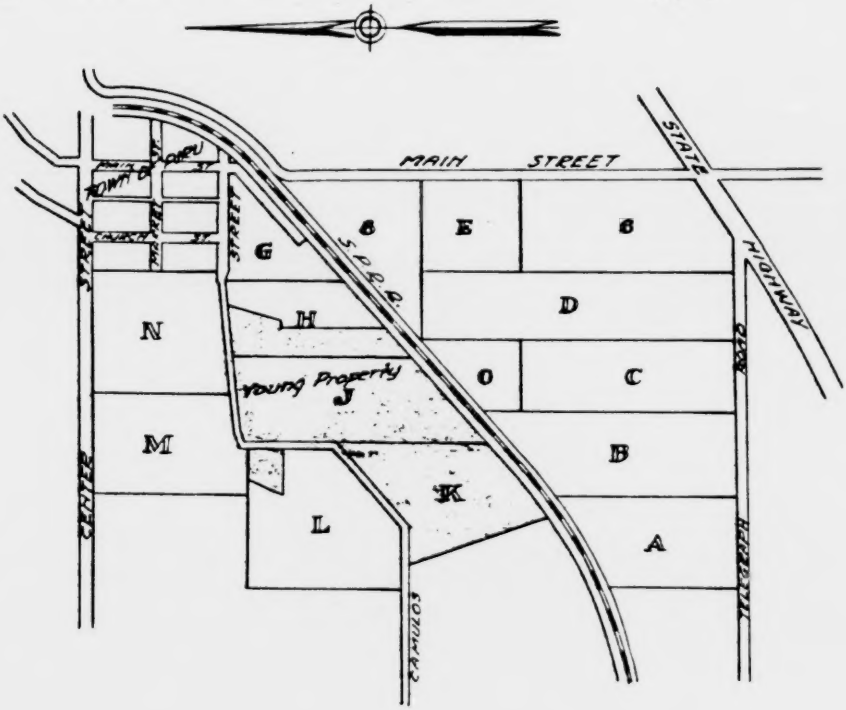
TREADWELL'S CONSTITUTION OF CALIFORNIA
ARTICLE I

Sec. 14. Eminent Domain. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation, except a municipal corporation or a county or the state until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; provided, that in an action

in eminent domain brought by the state, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district, the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained acocrding to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings. The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier. (Amendment adopted November 6, 1928.)


CHURCH
STREET
TOWN OF
W. W. Lecher
MARKET ST.
PIRU
W. W. Lechler
40'
STREET
N 89°-44'-40" W.
LOT "G"
G. and M. Cadena
LOT "H"
Rd. nail F.B. 498/34
VILLA
Frank C. Mazon
S. 63°-30'-20" W. 10.92'
A = 50°-28'
R = 150'
T = 70.69'
L = 132.12'
gum trees
S. 7°-05'-10" E. 385.72'
oranges
5'x18'x24' R.C. Bridge
(L.B.Z.)
A = 70°-44'
R = 100'
T = 70.98'
L = 123.45'
cable and rock protection
Survey Line
18" pepper
3'x15'x18' T.&C. Bridge
chicken house
Property Line
S. 10°-54'-50" W. 347.27'
Milton K. Young
(part of Lot H)
LOT "H"
Piru Fruit Ranch Inc.
PIRU
CENTER
CAMULOS
S 85°-20'-20" W.
LOT "H"
LOT "J"


SURVEY OF
NIGGER CANYON WASH
SOUTHERLY ONE HALF MILE FROM
CENTER STREET PIRU
VENTURA COUNTY CALIFORNIA
OFFICE OF THE COUNTY SURVEYOR
VENTURA COUNTY CALIFORNIA
SCALE 1" = 100'
100'
TRACTS
PIRU VILLA LOTS
Southern Pacific Railroad
S. 53°15'30" W.
W. Duke Clark
LOT B
LOT "E"
LOT "D"
Chas. S. Johnson
Ramon Nunez
LOT "H"
"G"
"H"
2 single row, fruit trees
rock protection work
gum row
℄ survey Line
orange trees
S. 6°02'20" W. 503.64'
(Part of Lot H)
ton Young et al.
Δ = 12°05'
T = 52.92'
R = 500'
L = 105.45'
"H"
"J"
Milton Young et al
11+41.21 B.C.
oranges on contour
10+46.66 E.C.
S 18°07'20" W.
127.52'
S 71°08'10" E. 105.16'
20+79.34
45.00' Trestle
19+74.18
oranges 25'x25' (interset)
℄ survey Line
oranges, 24' ctrs (interset)
S 0°00'20" W. 2002.98'
LOT "D"
PIRU
VILLA
TRACTS
9' conc. well
16'x16' pump house
15'x12' camp
LOT "C"



Map of a portion of
PIRU VILLA TRACTS
and a portion of
PIRU VILLA LOTS
VENTURA COUNTY CALIFORNIA
Scale 1" = 800'